

A *Ma Deane*
TREATISE
CONCERNING
TRESPASSES
Vi & Armis.

John WHEREIN *Smith*
The Nature of Trespasse is clearly explicated,
and the Gift of the Action stated, and by whom such Actions may be brought, and against whom and how to be laid, Together with the Forms and Learning of Writs, Declarations and Pleadings, in ~~reference~~ to all sorts of Torts or Wrongs done to a Man's Person, Estate or Interest. And also wherein is contained all the Learning of our Law concerning Pleadings and Bars by way of Excuse, Justification, Concord, Amends, &c. With the general Rules of Pleading in this Action, and particular Rules applied to every Case. Together also with a clear and methodical Discourse of the curious Learning of Traverses, of Replications in this Action; and of Evidence, Verdict, Damages, Costs, and Judgments therein. To which are added References to Presidents and Entries proper to each Title.

A Work very Useful for Students and Practisers of the Common Law.

By the Author of *Lex Custumaria.*
by Samuel Carter

L O N D O N : 8°

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TO THE
STUDENTS
OF THE
Common Law.

Gentlemen,

ACTIONS of Trespass in our Ancient and Modern Books are very numerous (though since the Statute of *No more Costs than Damage*, they have been frequently turned into Actions on the Case). And we need not wonder at it, considering the Infirmities of depraved Mankind. Without doubt the State of Nature now is a State of War; Injustice, Injuries, and Violences are radical in us since the lapse of the first *Adam*; and these Seminal Principles are but too much improved by vicious Conversation and other Accidents of Life: In-
somuch, that were there not some Awe upon Mens Spirits, either by present
A 2 tempo-

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temporary Penalties, or perhaps a Prospect of Futurity (the Notion whereof can scarce be wholly stifled) I believe the general part of Mankind would degenerate into Brutish Fury, and those amongst them whose Education might furnish them with Sentiments truly humane, would be so few and inconsiderable, that their Instructions would be useless, and their Examples despicable. It is Fear which not only sets Bounds to the Malice and Rapine of private Persons, but of Societies; ay, and checks the Ambition of Kingdoms. It is not, as one saith, Seas or Ranges of Mountains that limit their Dominions, but a mutual fear of each other: Hence it is that they build Ships, and fortify their Frontiers, and retain the Idea of War in the midst of the most profound Peace. So it is in a sort amongst private Persons: I am not despoiled of my Goods, I am not injured in my Person and Interests, I am not disseized of my Estate; Thanks to our Laws, and not the good Nature of my Neighbour: I say our Laws, which will protect the wronged Innocent, and punish the tortious Actor. Were it not for this, every Assault and Battery would be no less than a *Mayhem*, or Murder, and that Fury which incites one to destroy his Neighbour's Sustenance, would soon
provoke

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provoke him to take away his Life. I have been the larger upon this Argument, for that it seems astonishing that there should so many Thousands Actions of Trespafs Yearly stand upon Record in a Christian Polity, and where the essential Principles of the Religion which they Profess, lay an indispensable Obligation to Peace, Love, Meekness and Charity: Hence it is then, that our Law-Books abound with so many Cases of Trespafs, neither ought the Professors thereof to be blamed for it. If a Man commit a Trespafs maliciously, I can pardon him and pity him as a Christian; But I ought not to spare punishing him as I am a Member of a Politick Society, when he continues obstinate and perseveres in his Malice; but this Punishment must be by Law.

When I considered so many Cases lay scattered and dispersed in our Books, and several contradictory Reports of them, I believed it might be useful to bind them up and to methodize them, that so they might appear in full view; and by comparing one with another, the Truth and Force of the Reasons might be better illustrated in themselves.

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The Method I have followed is easy and natural, not forc'd or elaborate. Divisions and Methods were invented for Perspicuity rather than Ornament; and that Order which is most conformable to the Subject Matter in Hand is best.

I have herein considered some Titles more particularly than others, either for their Importance, or their Abstruseness and Subtlety: For the former Reason I have been the larger on the Title of Declaration, as being the Fund of the Proceedings; and an Error there is like a Failure in the first Concoction.

I have also been more particular as to Pleas by way of Justification, which are of great variety and exceeding useful. But as to the Learning of Traverses, the Art of Pleading is therein rendred fine and ingenious. It is one of the profoundest Pieces of Learning in our Law how to manage that part of Pleading, and therefore I well hope to beg the Reader's Pardon for being tedious on that Subject. In Traverses and Replications (in Trespas especially) the Beauty of accurate Pleading appears; they are like the just Proportion of Features, upon which re-
sults

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sults a good Mien, or (as we call it) an apt and proper Issue.

As to the Chapter of Damages, where we treat of severing them where they should be entire, or giving them entirely where they ought to be severed, the Consideration thereof may be useful to you in your Circuits, and as my Lord Coke observes in *Playter's Case*, Save their Clyent the Fruit of their Victory.

I foresee it will be objected, That Ejectments as to Titles have jumbled out the old elaborate Pleadings in this Action. I shall only reply, It is so; but in some Cases many would advise to try a Title rather by Trespass or Replevin, &c. if they foresee a material Point, which they would fix upon, than by Ejectment, where fifty Points may arise out of an hundred Skins of Parchment, and all start up one immediately after another, to the confounding Judge and Jury, and to the Loss oftentime of a Tryal, at least for that Turn. However, no ingenuous Law-Student but will be delighted in this curious Learning, though the Practice of it (as to this) be laid aside: I make this Piece the more compleat, and I thought it not my Duty to offer you a maimed Present.

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But I must not be too tedious, lest I
my self become a Trespasser against your
Patience; which if I am, I shall not plead
in Bar, but readily confess the Action by
subscribing my self

Your Humble Servant.

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THE
Law of Trespass,
Vi & Armis.

C A P. I.

Of the nature of Trespass Vi & Armis, and wherein it differs from Trover, Replevin, Ejectment, and Trespass on the Case.

FOR the clear understanding of the nature of this Subject (as it is settled at Common-Law) I shall first lay down some general Maxims, and then shew wherein it differs from other Actions, which are of some likeness to it in respect of *Tort*; and in the next Chapter I shall further explicate it, in shewing the *Gift* of the Action, and what sort of Possession or Entry is requisite to maintain this Action; wherein it will not be improper to add something of Trespasses by relation, or what shall make a Man a Trespasser *ab initio*: All which will fully unfold the Notion of Trespass, and be a firm Foundation for the following Superstructure.

The Law of Trespafs.

As for exact Logical Definitions or Divisions, Dichotomies, Trichotomies, and such-like elaborate and subtle, as well as unprofitable finesses, I shall leave to those who have time and leisure for diversions of that nature; our Common-Law-studies obliging us to a true subtlety of Ratiocination and Pleadings, *veritatem & certitudinem inveniendi gratia non disputandi*; between which and the other subtleties there is as much difference, as there is betwixt the niceness and skipping volubility of a wrangling Sophister, and the stated Gravity and prudent Arguments of a Serjeant at Law.

But Trespafs may be defined to be a *Tortfeasance*, doing wrong with Force and Arms, to the Damage of another in his Person, Estate or Interest: And this will comprehend all the sorts or Species of Trespafs, as you will find in your further perusal hereof; and the reason of the addition of this form of words, *Vi & armis*, you will see hereafter.

But, to explicate the true Notion of it, Note,

1. *Trespafs disaffirms Property*. Therefore the Plaintiff shall recover the value in Damages; except in Action of Trespafs or Ravishment of a Ward, for in that he doth not renounce the Property. *Yelv. p. 96. Croke Jac. 147. Bagshaw's Case*. Yet, though I have my Goods and Chattels again, I may bring my Action of Trespafs for the Tort as it is in *Hutton's Rep. p. 81. Laicon & Bernard.* An Action was brought, *quare cepit & abduxit* a Gelding; and by the Pleadings it appeared that he had his Gelding again. But some of the Judges, when this hath been cited in other Cases, have not seemed well pleased.

2. The consequence of the former Maxim is, *That the nature of Trespafs is to end in Damages*; and this differs it from *Trover* and *Replevin*, which affirm

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affirm Property. *Hob. p. 95. in More and Hussey's Case.*

3. *In Trespaffes vi & armis, there ought to be a voluntary act;* otherwise this Action lies not. If one drive Sheep by the way, and they escape into my Land against the will of the Driver, Trespafs lies not. So if a Dog chase the Sheep into another's Land. *Lach. p. 13. 119. Millen's Case.* And if one plead a tender of amends, he must say the Trespafs was involuntary; however, that is only in excuse of the Tort.

4. *In Trespaffes vi & armis, there must be damnum & injuria.* A Trespafs ought to be done voluntarily, and so it is *injuria*; and it must be an hurt to another, and so it is *damnum*.

5. *There are no Accessaries in Trespafs.* In the lowest and highest Offences, there are no Accessaries, but all are Principals; as in Riots, Routs, forcible Entries, and other Transgressions *vi & armis*. And so in the highest Offence, which is *Crimen læsæ Majestatis*, High-Treason, there are no Accessaries. *Co. Litt. p. 57. a.* He who gives consent and aid to the Trespafs, is a Principal in the Trespafs. *Co. 12 Rep. 81.*

6. *Trespafs in Law is several, and one may answer without the other.* *Co. Litt. 130. b. f. Vide plus infra sub tit. Several Pleas.*

7. *Actio personalis quæ oritur ex delicto moritur cum persona*, as all Trespaffes of Batteries, &c. Plaintiff declares, That the Defendant did assault and beat, &c. *A.* his Wife such a day, of which she died such a day ensuing: It's not good; this being a personal Tort to the Wife, it's dead with her. *Telv. 89. Higgins and Butcher.* The Executor shall have an Action *de bonis asportatis in vita Testatoris*; but not for a personal wrong; as, a Keeper suffers the Escape of a Prisoner, and dies, his Executors may not be sued for this.

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Wherein Trespafs differs from Trover.

For a *furtivus* taking of Cattle (as for an Heriot where none is due) Trespafs lies, or Trover at election; for a Man may affirm or disaffirm his Property. *One may qualifie a Tort*; and for a *furtivus* taking, a Man's Property is not divested but at his election. If Goods are taken by a Trespaffor, and if the party from whom they are taken be attainted of Felony, he shall forfeit them; for the Right and Property remains in him, and the Law shall adjudge them in him, until he makes his election to the contrary, by bringing a Writ of Trespafs. *Crok. Eliz. 824. Bishop's Case. Crok. Car. 89. Kynaston's Case. Mod. Rep. p. 30.*

In Trespafs, colour of Possession given by the Defendant to the Plaintiff sufficeth, because this Declaration is general upon a supposal, without any Title put in certainty: But in Trover, and all other Actions where the Plaintiff makes Title to the thing demanded, there it behoves the Defendant to make a better Title to himself, and to traverse the Title of the Plaintiff, or else to confess and avoid it.

There is a Case in *Stiles's Reports*, which is pretty subtle. Error was brought to reverse a Judgment in Trespafs, *vi & armis*, at *Doncaster*. The Error assigned was, That the Plaintiff declared that the Defendant took certain Cows of his out of the Jurisdiction of the Court, and brought them within the Jurisdiction, and there converted them to his own use; and it was adjudged to be Error, in regard the taking of the Cattle, which is the ground of the Action, was without the Jurisdiction of the Court: but had it been an Action of Trover and Conversion, it had been good; for in that the Conversion is the ground of the Action. *Stiles p. 313. Keightly and Rhodes.*

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Recovery in Trespafs for taking away Goods is no Bar to an Action of Trover. *Hutton* p. 81. *Laicon's Case*; and so is *Patt* and *Rawsterne's Case*. 3 *Mod.* 1. and *Raymond* 472. Trover and Trespafs are of different natures; as, upon a Demand and Denial, Trover will lie, but not Trespafs *vi & armis*, because the taking was not tortious.

Wherein Trespafs *vi & armis* differs from Trespafs on the Case. *Vid. postea*, cap. 3.

If one bring a meer Action on the Case, he may declare omitting the words *vi & armis*; but if the Action be a bare Action of Trespafs, there *vi & armis* must not be omitted, for it implies a breach of the Peace. *Pract. Reg.* 323.

Trespafs *vi & armis*, for chasing his Cattle into the Close of *J. S.* who took them *Damage-feasant*, and the Plaintiff was forced to pay to him 40*s.* for amends; but concludes not *contra pacem*. *Per Cur'* this is an Action on the Case, for the Action is not brought merely for the taking and chasing his Cattle, but for a special wrong, *viz.* for chasing them into another Man's Soil, and he was forced to compound for damnification; and though it be *vi & armis*, yet that doth not prove it to be an Action of Trespafs, for that may be in an Action on the Case; as, in 9 *Rep.* *Earl of Salop's Case*. *Crok. Car.* 325. *Tyffin and Wingsfield*. *Vide infra plura de hoc*, cap. 3.

In Trespafs *vi & armis*, the Judgment is *quod capiatur*; in Trespafs on the Case, the Judgment is *in misericordia*. *Vide plura*, cap. 3.

If the Action be an Action of Trespafs on the Case, though it were with a *vi & armis*, it may be good with a *quod cum*; but in a meer Action of

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Trespafs *vi & armis*, it cannot be so. *Stiles Rep.* 429. *Michell* and *Hepworth*.

If Toll be taken by a Milner of one which ought to be Toll-free, a general Action of Trespafs lies, and not an Action on the Case. 2 *Rolls Abr.* 556. 10.

Wherein Trespafs differs from Replevin.

Trespafs is of less certainty than a Replevin: Therefore in a Declaration in Replevin a place ought to be assigned as well as a Vill, and the Place as well as the Vill are traversable by the Avowant: But in Trespafs, the Plaintiff may assign his Trespafs only in a Vill; and if he assign a place, the Defendant may plead at another place, without traversing the place assigned by the Plaintiff, and then the Plaintiff may take a new Assignment. *Hobart p. 16. Read's Case.*

In Replevin, because the Plaintiff is to have a Return (that is to say the Avowant) it behoves the Avowant to make a good Title *in omnibus; aliter* in Trespafs. Defendant in Trespafs pleads that the House was held of N. Earl of N. as of his Manor of W. Jury find it was held of N. Earl of N. as of his Manor of S. and good; *aliter* in Replevin. *Yelv. p. 148. Goodman and Ayling.*

As a Man may have Detinue or Replevin for Goods taken by a Trespaffor, which affirm always Property in him: so he may have a Trover; for one may qualifie a Tort, but not increase a Tort. *Crok. Eliz. p. 824. Bishop's Case.*

Wherein Trespafs differs from Ejectment.

In Trespafs Damages are only to be recovered, but in Ejectment the Thing it self.

Possession

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Possession is a good Title for the Plaintiff in Trespass, if the Defendant have no better to shew; aliter in Ejectment; for there if the Plaintiff hath not Title according to the Declaration, he cannot recover, whether the Defendant hath Title or no.

1 Leon. p. 215. in Cotton's Case. Yelv. p. 223.

The Title of the Plaintiff in Ejectment ought to be answered of necessity by matter of Fact or in Law, which confess and avoid the Title, or traverse it; for a naked colour in this Action sufficeth not, as in *Affize, Trespass, &c.* which do not comprehend any Title or Conveyance in the Writ or Count, as this Action of *Ejectione firme* doth in both. *Dier* 366. *Pl.* 35.

The Plaintiff declares in Trespass in one Acre, and abuts it; the Jury find him guilty in *dimidio acrae praed*; this is good: But if it were in Ejectment, the Verdict had been ill; for it is not certain in what part the Plaintiff shall have his *habere facias possessionem*. *Yelv.* p. 114. *Winckworth's* Case.

In Ejectment the *Venire* must be *ad faciend' jurat' in placito Transgressionis & Ejectione firme*; in Trespass it must be *in placito Transgressionis* only; for they are several Actions, and the *Venires* must be accordingly. *Crok. Eliz.* p. 622. *Clerk* and *Clerk*. Vide plus Law of Ejectment.

C A P. II.

The Gift of the Action. What shall amount to a Trespafs, and what not. What shall be a sufficient Possession to maintain the Action. Where an Action of Trespafs lies not without Entry or Re-Entry, and where it lies for one without Re-Entry; And what Act shall make a Man a Trespasser ab initio.

The Gift of the Action, or what and when an Act shall amount to a Trespafs, and what not.

I Shall in the next place lay down some general Rules, how, and in what Cases, a Man becomes a Trespasser; for as to the laying the Action as to Time and Place, *vide postea*.

1. *Whatsoever is done contra pacem, is a Trespafs*: Therefore if a Man take my Servant out of my Service, and retains him, Trespafs lies against him; *aliter* if he procure him to go out of my Service, and then retain him. 2 Roll. Abr. 556. *Whetely and Stone*.

2. *For what is taken out of my possession, Action of Trespafs lies*; as, If one rescue a Man taken by a Serjeant at my Suit, Trespafs lies against him, or an Action on the Case, at my election. So against a Servant that takes Goods out of my Shop. 2 Roll. Abr. 556. *Whetely and Stone*. 1 Leon. Rep. 87, 88. *Ashtell and Rudge, Pattinger and Marriot*.

3. *If Trespafs be laid before the Title of the Plaintiff accrue, it's not good*, though it appear upon Evidence only; as, The Plaintiff brings Action

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Action for taking certain Carts loaded with Corn, which he claimed as a Portion of Tythes in the Right of his Wife, and supposeth the Trespafs to be done the 27th of *August*, 29 *Eliz.* and on *Not Guilty*, it was given in Evidence for the Defendant, That the Plaintiff's Licence to be married was dated 28 *August* 29 *Eliz.* and that he was married the same day; the Bill abated. But if the Trespafs had been assigned to be committed one day after, then it had been good: but now it is apparent, that at the time of the Trespafs assigned by himself, the Plaintiff had no Title; and he was Non-suit. 1 *Leon.* p. 104. *Pawlett and Lawrence.*

4. Possession is ground sufficient to maintain this Action; and Possession is a good Title for the Plaintiff, if the Defendant can shew no better. *Yel.* p. 223. 1 *Leon.* 215. *de hoc plus postea.*

5. If a Man take another's Goods without any wrong done by himself, or come to them by Title, no Action of Trespafs lies. If the Sheriff upon a Writ of Extent take a Furnace fix'd to the Land, and sells this to *J. S.* and *J. S.* takes it, no Action of Trespafs lies against him; for *J. S.* comes to this without any wrong done by himself. So if a Stranger takes my Horse or other Goods, and sells them to *J. S.* and *J. S.* takes them accordingly, no Action of Trespafs lies against him. 2 *Rolls Abr.* 566. *Day and Austen.* But if a Furnace be fastned to the Wall of an House, and is attach'd by the Sheriff, and delivered to the Plaintiff, who immediately took it, he was a Trespasser. *Crok. Eliz.* 374. *Day and Bisbitch.*

6. The Commander or Procurer of a Trespafs done, is a Trespasser. *Latch. Rep.* 154.

7. Bailiff of Goods, as an Horse, &c. kills them, a general Action of Trespafs lies, or Trover. *Cok. Litt.* 57. a. for the Bailiff hath a bare use of them, and when he takes upon him as an Owner to kill them,

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them, he loseth the benefit of the use of them ; or he may have an Action of Trespafs on the Case for this Conversion. 5 Rep. 13. b. The Plaintiff a Grocer held a Shop of Grocery, and declares *quod ille reposuit fiduciam in Defendente*, to sell the Grocery Wares of the Plaintiff in the said Shop ; and it was further found by special Verdict, That the Defendant being in the said Shop, *cepit & asportavit* the said Wares, and did convert them ; and it was adjudged in this Case, that an Action of Trespafs *vi & armis* did lie ; for when the Defendant was in the Shop, the Wares did remain in the custody and possession of the Plaintiff, and the Defendant hath no interest, possession or other thing in them, but only to utter them by Sale according to his Commission. 1 Leon. p. 85. Case 110. Glosse and Hayman. Vide Crok. Eliz. p. 784.

He that will maintain this Action for any wrong done to him in his Lands or Goods, he must have a good Property, or at least a good Possession, in the thing wherein and whereof the Trespafs is supposed to be done.

8. He that cometh to a thing by the Law, may not be charged in Trespafs, as by the delivery of the Sheriff in a Replevin sued, 44 Ed. 3. 6. Vide *supra*.

9. For Non-feasance no Action of Trespafs *vi & armis* lies. 8 Rep. 146. 1 Rolls Rep. 130. Vide *plus postea*, tit. *Trespasser ab initio*.

10. When the Defendant's Beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justifie the taking them in any place he finds them. Crok. Eliz. p. 329. Chapman's Case.

In Justification in Trespafs ; the Case was in *Moor Mich.* 2 Eliz. a Man made a Lease for years of Land, a Stranger entred upon the Lands lett, and cut down Trees growing, and made them
Timber,

Timber, and carried them into the *locus in quo*, &c. and then gave the Timber to the Plaintiff, and the Defendant entred into the Land, and took the Timber. *Per Cur.* In all Cases where a thing is taken wrongfully, and altered in form, if yet that which remains is the principal part of the substance, the notice of it is not lost, but the Property remains still; therefore if a Man takes Trees, and makes Boards of them, the Owner may retake them, *quia major pars substantiæ remanet*; aliter if an House had been made of the Timber. So if a Man takes my Cloak, and of this makes a Doublet, I may retake it.

II. In some Cases this Action must of necessity be brought, and you cannot have another, or change it. One who was not Bailiff to the Earl of Bedford took away Cattle, and in truth took away the Cattle as a Distress against the Earl's will, and in Replevin he made conusance as his Bailiff. Now the Plaintiff cannot traverse that he was not his Bailiff, for that is not issuable; nor can the Earl disavow it, for he is not Party; nor can the Earl have an Action on the Case, for he is not damnified: but the party whose Cattle are taken may bring Trespafs; and then if the Defendant justifies as Bailiff, he may reply *de son tort demesne sans tiel cause*, and so punish him. *Crok. Eliz. p. 14. Earl of Bedford's Case.*

12. No Trespafs lies for that which appears to the Court to be Felony. Our Books seem to vary. *Yelverton* fo. 89. *Higgins* and *Butcher*, saith it's an Offence to the Crown, and drowns the particular wrong. *2 Rolls Abr. 557. Markham* and *Cobb's Case*, seems that it lies. I think they may be reconciled by this difference: After Conviction Trespafs lies, and not before; for if it would lie before, there is great danger the Felon would not be tried, and many Felonies would be smothered.

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red. *Stiles* p. 346. *Dankes* and *Coveneigh*. Sed quære.

13. He that cometh to Goods by delivery of the Plaintiff, may not be charged in Trespafs, but Detinue; as, If *A.* buys Goods of me, and after leaves them in my Possession, and I deliver them to another. 2 *Rolls Abr.* 555. But if the Goods be abused or destroyed, then Action of the Case lies for the Negligence. *Litt. Rep.* 15. 5 *Rep.* 13. b.

14. Trespafs may lie for Acts well done and well intended. *Dier* 36. b. Though a thing sound to the Profit of a Man, and not for his Damage, yet it's not lawful to do a Tort; as, One sees his Neighbour's Beasts in another Man's Soil doing Damage-feasant; if he drive them out, the Owner shall have Trespafs. So 21 *H.* 7. a person brought Trespafs for Tythes taken away. Defendant saith, The Tythes were severed from the Nine Parts, and were in jeopardy of being eaten by Cattle, therefore the Defendant carried them to the Plaintiff's own Barn. Adjudged no Plea. *Dier* 36. b. 15 *H.* 7. 17. 17 *H.* 8. 15.

15. In some Cases I shall have this Action, though I have parted with my Right to the thing; as, If a Man take my Goods, and after I grant them to another, yet I may have an Action of Trespafs for the taking, 2 *Rolls Abr.* 557. a.

16. If one load my Cart with his Corn, or Boat with Coals, or put his Saddle on my Horse, I may well take my Cart with the Corn, or Boat with Coals, &c. and detain the Goods without being any Trespasser, and keep them till he bring his Action of Detinue. 1 *Bulst.* 96.

17. In personal Actions the Plaintiff may comprehend Torts, and several causes of Action; as, One Action of Trespafs for several Trespaffes made at several days, and in several places. 8 *Rep.* 87. b. *Buckmere's Case.*

In Trespafs it appeared upon the Evidence, that the Defendant had the first Possession, and then an Entry by the Plaintiff the very day of the Trespafs, is nothing without a Title: but if the Plaintiff had had the Possession before the Defendant, though long before, it would be sufficient; and then if the Defendant put him out of Possession, Trespafs will lie of this putting out, without a Re-entry; at a Trial before Judge Thorp. Countess of Arundel's Case.

What shall be a sufficient Possession or Property to maintain an Action of Trespafs, and what not.

A Man which hath a Freehold in Law, if he had not the actual Possession, may not have an Action of Trespafs, as the Heir against the Abator. 19 H. 6. 28. b. 2 Rolls Abr. 553. S. 1, 2. 22 H. 6. 49.

If any had Possession of a thing, he shall maintain the Action against him that had not Right. Plowd. Com. 546. a. 1 Leon. 215. Possession is a good Title for the Plaintiff, if the Defendant have no better to shew. Yelv. 223.

Property draws with it the actual Possession of the Beasts or Cattle upon which to ground a Trespafs. If a Man gives to me his Goods in York; if another takes them, I shall have Trespafs. Latch. 214. Hudson's Case. 2 Ed. 4. 25. 3 Rep. 26, 27.

Where the Law casts the Property or Possession upon any, before Seizure, he shall have Trespafs; as, If any take the Goods of the Testator before the Executor hath seized them, he shall have Trespafs or Replevin before Probate, for the Property and Possession was in him before Seizure. If the Ninth part of the Corn is severed for Tythes, the Parson shall have an Action of Trespafs against him who takes

The Law of Trespass.

takes them before Seizure, for the Property and Possession were in him before Seizure, for that the thing is certain by the severance of the Ninth part. But if one ought to have the best Beast for a Mortuary, the Property is not in him before Seizure, for it may be questioned which is best, and for this he shall determine his election by Seizure, and before this he shall not have an Action of Trespass or Replevin. *Plowd. Com.* 281. a. in *Greysbrook* and *Fox's Case.* 2 *Bulst.* 268. *Young's Case.*

A Sheriff took Goods by *Fi. fa.* and before Execution done by Sale, the Defendant took them again, he may bring Trespass, though he had not any Property. *Crok. Eliz.* 639. *Tirrel* and *Bash.*

There are several steps to the Possession to several purposes; for an Executor made at *London* shall have Trespass of Goods at *York*: but the Lord shall not have Trespass of a Stray before actual Seizure.

In Trespass and Assault, Defendant saith, He was possessed of an House, (and shews not how) *& molliter manus imposuit ad extraponend' Quer' a domo, &c.* This is a good Justification, because the Possession is an inducement to the Plea, and he need not shew how or for what he is then possessed. 1 *Crok.* 138.

An Intruder shall not gain such Possession against the King, upon which he may have Action of Trespass; as, The King is seized of Land in Fee, and a Stranger enters, claiming this as his own, and continues Years and Days, and another doth trespass upon the Land, the Stranger shall not punish him. *Plowd. Com.* 546. a.

Where

Where an Action of Trespafs lies not without Entry.

Lands descend to the Heir, without Entry he shall not have an Action of Trespafs. *Cok. Litt.* 57. b. as, If a Man lets the Land of his Wife for years, and the Wife die, the Heir shall not have Trespafs against the Lessee before Entry.

A Man makes a Lease to J. S. to commence at the Feast of St. Michael; Lessee may grant, but he cannot have an Action of Trespafs before Entry. *Plowd.* 142. in *Browning* and *Beefton*.

Against a Tenant at Sufferance; as, If Lessee holdeth over his term, the Lessor cannot have an Action of Trespafs before Entry. *Cok. Litt.* 57. b.

My Father dies seized, and a Stranger abates, I shall not have an Action of Trespafs before Entry.

If a Man bargains and sells Lands, he cannot bring this Action before actual Entry. *Carter's Rep.* 66, *Geary* and *Barcroft*.

If Lessee at Will dieth, and his Heir enter, Lessor shall have a good Action of Trespafs against him. *Litt. sect.* 82. before Entry.

He that hath Right or Title to Land only, either by Descent, Condition broken, or a Lease made to him of the Land, may not bring this Action before his actual Entry into it. *Plowd.* 441, 546. *Keil.* 163.

Continual Claim, which is an Entry in Law, is as strong as an Entry in Deed: therefore as often as he that hath Right of Entry maketh such Claim, and notwithstanding this his Adversary continues his Occupation, so often he doth wrong and disseisin to him that made the Claim, and so often may he that makes such Claim have Action of Trespafs, *quare Clausum fregit*, and recover Damages. *Cok. Litt.* 256. b. 257. a.

Cestuy

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Cestuy que use is at this day immediately and actually seized, and in possession of the Land, so as he may have an Affize or Trespass before Entry against any Stranger who enters without Title. *Crok. Eliz.* p. 46.

Where one may have Action of Trespass without Re-Entry; and where not till after Re-Entry.

Disseisee shall have an Action of Trespass against the Disseisor, and recover his Damage for the first Entry without any regress: but after regress he may have an Action of Trespass with a *Continuando*, and recover as well for all the mesne Profits as for the first Entry, (*Co. Litt.* 257. a.) for he himself was seized at the time of the disseisin, which is sufficient possession to maintain the Action, and therefore he shall have Trespass for the Trespass made in the disseisin without Re-Entry.

But if a Man be disseized, he shall not have Trespass for any Trespass by the Disseisor, or a Stranger, made after the Disseisin, before Re-Entry. *2 Rolls Abr.* 553. S. 3. But after Re-Entry he may, for by his Re-Entry his Possession is restored *ab initio*, and for ever. *Vide Cok.* 11. 51. *Liford's Case.*

If my Disseisor makes a Feoffment in Fee, Gift in Tail, Lease for Life or Years, and after I enter upon the Feoffee, Lessee or Donee, I shall have Trespass against the Feoffee, Lessee, &c. for the first Entry, although he comes in by Title. *2 Rolls* 554. t. 7, 8. *Vid.* 11 *Rep.* 51. b. *Crok. Eliz.* p. 540. *Holcomb and Rawlins.*

By the Re-Entry of the Disseisee, he is remitted to his first Possession, and as if he never had been out of Possession: and then all who occupied in the mean time, by what Title soever they come in, shall answer unto him for their time; as, If a Disseisor

seisor had been disseized by another, the first Disseisee re-enters ; he shall in Trespas punish the last Disseisor, otherwise after his Re-entry he should have no remedy for the mesne Profits.

If an Estate be determined by Limitation or act of God after the disseisin, so that the Disseisee may not re-enter, he shall have Trespas with a *Continuando* for all the time after the Disseisin, and recover the mesne Profits without Re-Entry ; as, If *Tenant pur autre vie* is disseised, and *Tenant pur autre vie* dies : So if the Tenant for term of years be ousted, and after the term expires ; *aliter*, if the Entry of the Disseisee be taken away by his own act, as by Release, &c. 1 Rep. 98. a. 2 Rolls Abr. 550.

Trespas for mesne Profits.

In Trespas for mesne Profits, Special Bail is always given. 1 Keb. 100.

If a Recovery be in *Ejectione firme*, and after Trespas is brought for the mesne Profits before the Lease, nothing shall be given in Evidence but the value of the Profits, not the Title. *Sydesin* p. 219. *Collingwood* and *Ramsay*.

A Termor being Outlawed for Felony, granted his Term and Interest to the Plaintiff, who is put out by J. S. and after the Outlawry is reversed, and the Plaintiff brought Trespas for the Profits taken between the Outlawry reversed and the Assignment. Adjudged that the Action did lie ; for though during that time the Queen had the Interest, and the Assignee had no Right, yet by the Reversal it is as if no Outlawry had been, and there is no Record of it. *Crok. Eliz.* p. 270. *Ognell's Case*.

It was held by Justice *Vernon*, Where a Man would recover the mesne Profits in Trespas, he must prove Entry into every parcel, and not into one part in the name of all. C An

An Action of Trespafs came to Trial before *Thorp*, for recovering the mesne Profits, and the Trespafs was laid 17 *May*, with a *Continuando*; and the first Entry was before the 17th day, and an Ejectment had been brought of this Land the same Assizes; and because a second Entry is required to recover the mesne Profits, the which if it shall be, will happen after that time which he hath acknowledged himself out of possession by his Action of Ejectment, and such Entry will abate the Action, it was directed to find Damages for the first Entry only.

It's a Rule in Law, Where a Man is remitted to an Estate, all persons who occupy the Land, by what Title soever they come in, must answer to him for their time. *Crok. Eliz.* 54.

What Act shall make a Man a Trespasser ab initio.

If a Man enter into a place by Authority of the Law, and abuse this Authority, he is a Trespasser *ab initio* by his first Entry. *Vide infra*. As, If one come into a Tavern, and stay there all night against the will of the Owner. *Vid.* 9 *Rep.* 22, 23. 8 *Rep.* 146. 5 *Rep.* 13. b. Six Carpenters Case.

If a Man deny Goods to the Owner which he had found, no Trespafs *vi & armis* lies; for no Non-feasance shall make a Man a Trespasser *ab initio*. *Cok.* 8 *Rep.* Six Carpenters Case.

If a Man take a Distress, and the other tender amends, and he refuseth: yet no Trespafs lies against him for this Non-feasance. 1 *Rolls Rep.* 130.

The Bailiff seizes Beasts for an Heriot where was not any due, and without any command of the Lord, and after the Lord assented. *Per Cur.* Assent before or after the taking the Goods makes one

one a Trespasser *ab initio*. But not an assent after to a Battery formerly done. *Crok. Eliz.* p. 824. *Bishop's Case*.

If a Man seize or take a thing lawfully, and after abuse it, he is a Trespasser *ab initio*.

If a Searcher unpack Cloaths, and throw them in the Dirt, he is a Trespasser *ab initio*.

If a Man take my Sheep Damage-feasant, and I tender sufficient amends before the Impounding, he is a Trespasser *ab initio* if he drive them to the Pound. 2 *Rolls Abr.* 561.

If the Lord of a Manor within the year labour the Estray, as by Riding, Drawing, &c. he shall be a Trespasser *ab initio*. *Crok. Jac.* 148. *Bagshaw and Goward*. So it is if one abuse a Distress. 2 *Rolls* 562. II. *Bagshaw's Case*. *Yelv.* p. 96. *mesme Case*, though the taking the Estray be justifiable; for by the seizure of the Estray he had not a Property, but a nude Custody.

If the Lord of a Fair take a Beast for Toll, and after work him, he shall be a Trespasser *ab initio*. *Rolls 2 Abr.* 562.

If by Custom Bailiffs seize Hides for non-payment of 2 *d.* for every Hide; if they tan them, and convert them to Leather, they are Trespassers. *Duncon and Reeves Case* adjudged, &c.

If a Sheriff make no Return, or a false Return after the Party is arrested, it is *faux Imprisonment* in the Sheriff, but not of the Sheriffs Bailiffs. *Q.* It is not so in any that comes in in aid of the Bailiffs: But Bailiffs-errant or special are Trespassers *ab initio* if they arrest a Man, and the Sheriff doth not return the Writ. 2 *Rolls* 562, 563. *Parker and Mosse*.

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If the Lord comes upon the Land, and drive a Cow: If he do impound it, it shall be adjudged a Distress; but if he kill it, he is a Trespasser. 9 Rep. 11. 2.

A misuser of a Licence in Law makes a Man a Trespasser *ab initio*; as, If a Man distrain Corn in the Sheaves, and thrash it; or come into a Tavern, and steals, &c. Telv. p. 96. in Bagshaw's Case. Otherwise of a Licence in Fact; for this excuseth the Entry, and he shall only be punish'd for a tortious act, if any be.

If a Man makes his Executor, and dies, and the Executor, amongst other Goods of the Testator, finds an Obligation in which his Testator was bound to J. D. and he breaks the Seals off, he is a Trespasser *ab initio*. 2 Rolls Abr. 563. Higginbotham's Case.

Of Commanders, Accessories, Assisters or Abettors in Trespas.

If A. comes in aid of B. who beats me, although that A. do nothing against me, yet he is a Trespasser as well as B. 22 Ass. 43. 27 Ass. 4. So if a Man command another to beat me.

Tresp' de Porco interfect' bar quod defendens fuit serviens Quer' & per Præcept' querentis interfecit Porcum. Rep. de injuria propria, & traverse le Precept. Ra. Ent. 663.

If one consent to a Trespas done, he shall be charged as a Trespasser. So where a Servant takes Sheep for an Amerciament, and the Master agrees, Trespas lies against the Master and Servant. Water's Case, 9 Car.

The Law of Trespas.

21

If a Servant do more than he is commanded by a Master, as, Where his Master bid him distrain my Cattle, and he abuseth them, the Master shall not be charged with any more than he commanded him to do. 21 H. 7. 21 Dier 365.

If many come to do a Trespas, and they are all present when the Trespas is done, and some only look on, yet they all of them may be charged as Trespasgers, if they do not declare their disagreement to it. Hob. 69.

If one command his Servant to do a Trespas, which he doth, and then dieth before any Action is brought, yet the Master may be sued for it. 17 H. 4. 19.

C 3

C A P.

C A P. III.

Where Trespas shall be Vi & armis, and where not; and where it shall be Trespas on the Case. Et vide supra.

THough the Nature of the Action may be properly upon the Case, as touching the Plaintiffs Loss or Damage, yet if done with Force, it may be *Vi & armis*. *Hobart p. 180. Wheatly and Stone. Stiles p. 427. Jones and Graves.*

Trespas *quare Vi & armis apud L.* He erected a Toll both, and took his Toll, &c. It is good *Vi & armis*, though he broke no Soil. *Crok. Jac. 122. Dent and Oliver.*

Against the Lord, *sur Stat. Marl. c. 15. W. 1. c. 16.* shall be *contra pacem*, but not *Vi & armis*. So upon the Stat. for distraining *aversa caruce, &c. 2 Inst. 131. Dier 312.*

Trespas against *S.* for that he *Vi & armis* rescued one that was arrested, and good. It will bear either Trespas *Vi & armis*, or Trespas on the Case. So for seizing an Heriot unjustly, *Trover* or *Trespas* lies at election. *Stiles p. 99, 100. Crok. Jac. 50. Bishop and Jordaine's Case. Crok. Eliz. 824.*

Note, The *Vi & armis* is but matter of Form, which is aided by Stat. 27 *Eliz. c. 5.* of general Demurrers. *1 Sanders 81. Lamb and King.*

In Trespas *Vi & armis*, the Judgment is *quod capiatur*. In Trespas in the Case the Judgment is in *miser cordia*. But the Plaintiff must beware that he follow his Original, if it be by Writ; for if that be *Vi & armis*, or upon the Case, the Judgment must be suitable, and so must it be in a Bill in the

Queens

Queens Bench; but if the Bill be Trespafs general, neither saying *vi & armis*, nor upon the Case specially, he may use it to either. *Hobart* p. 180. *Wheatly and Stone*.

Bailee of a Horse, &c. kills him, Bailor shall have an Action of Trespafs generally, or Trover. So against a Servant for taking his Master's Goods. *Cok. Litt.* 57. a. *Leon.* p. 87, 88.

One cannot do a thing *vi & armis* and *contra pacem*, where the Land is his own. *Het.* 74. *Crok. Car.* 377.

For Non feafance, or Negligence, it shall never be laid *vi & armis*, nor *contra pacem*; and when confidence is put in the party, Action on the Case lies; as, Bailment of Goods to keep them safe; and so of a Shepherd. 9 *Rep.* 50. b. *Countess of Salop's Case*.

A Man may be liable to divers Actions for one Trespafs in divers respects; as, One gets my Daughter with Child, she shall have an Action of Trespafs *vi & armis*, and I shall have Action of the Case *per quod servitium amisi*; and I shall have time to bring my Action in six years, if I lay it in Case; and though the *causa causans*, as entering my House, and making Assault on my Daughter, be *vi & armis*, it is but inducement to the Action, and the *causa causata* (*viz.*) the loss of Service, is the ground of the Action. *Stiles* p. 398. *Norton and Jafon*. So that by this you may observe in many Cases, though you have laps'd your time by the Statute of Limitations if you bring Trespafs *vi & armis*, yet you may relieve your self by changing it into Trespafs on the Case.

When there are two causes of an Action on the Case, *causa causans*, and *causa causata*; *causa causans* may be alledged *vi & armis*, for this is not the point of the Action. The Defendant may *vi & armis* hinder the Plaintiff from the Exercise

of his Office, and this is *causa causans*; by which he lost his Fees, this is *causa causata*, and the point of the Action. Breaking of an Inn may be alledged *vi & armis*, for the *defectus custodie* is the point of the Action against the Inn-keeper; and therefore if it be not *contra pacem*, in such Cases it's good, though it be *vi & armis*; for though the Bill recites that it is *placitum transgressionis*, and the Declaration is *vi & armis*, yet this doth not prove it to be an Action of Trespass, for that may be in an Action of the Case, as 9 Rep. Earl of Salop's Case: and although the recital of the Bill be in *placito transgressionis*, yet it is not of necessity to be Trespass only, but may serve for Trespass on the Case. Crok. Car. p. 325. Tyffin and Wingfield. Stiles p. 398. Norton and Jason. 2 Rolls Rep. p. 139. Dawtree and Dee, Allen, Rep. p. 84. Sir Anthony Ashley Cooper versus St. John.

Trespass by a Tenant against his Lord is not *vi & armis*.

Action *sur Stat. 5 R. 2. 7.* of forcible Entry, is not *vi & armis*. 1 Bulstr. 210. Cox's Case.

Nuisance is a Trespass, but not *vi & armis*; and so are all Trespasses on the Case. Fitzherbert N. B. tit. Transf.

In Action of Battery the Plea-Roll was *vi & armis*, but in the Plea-Roll of the *Nisi prius* these words *vi & armis* were omitted. The Plea-Roll shall controul the *Nisi-prius*-Roll; and it's usual to amend the *Nisi-prius*-Roll, and to give the very Judgment. 2 Rolls Reports 211. Hunt and Atbill.

Note a difference when an Interest is claimed, and when a Liberty only; as, Disturbing a Man going to a Fair, it may well be *vi & armis*; for he had an Interest in the Fair to sell his Commodities there. So of an Office or Mill; *aliter* in disturbing him to sit in an Isle in the Church, this is
but

but a Liberty. Yet *quære* if Injury be done to his Person. 2 Rolls Rep. 139. *Dawtry and Dee.*

In Action on the Case, Plaintiff declares, That whereas he had a Meadow, &c. that the Defendant had *vi & armis* erected a Bank, *per quod* the Water overflowed and drowned his Meadow. Now, because the erection is said to be *vi & armis*, and not the overflowing, and the overflowing is the point of the Action, it's good.

If a Man declare that he erected a Bank *vi & armis* in his own Soil, *aliter*; for it may not be *vi & armis* in his own Soil. 2 Rolls Rep. 248. *Whitting and Beemway.*

C A P. IV.

Having fully explicated the Nature of Trespafs, I shall now mention the feveral sorts of Trespaffes. but shall not say any thing upon them, because they are fpoken to in particular hereafter.

Trespaffes are either by Common-Law or Statute-Law.

By Statute-Law.

As to Trespaffes by the Statute-Law, they are fuch as thefe: *De malefactoribus in parcis*, vid. Dier 238 & 327. *fur Stat. W. 2. c. 10.* and Judgment in it.

De bonis asportatis, per 4 Ed. 3. c. 7. the Administrator as well as the Executor fhall have this Writ by Equity of the Statute. *Plowd.* 178. b. in forcibly Entry, upon the Statute 5 R. 2. c. 7. 8 H. 6.

Trespafs *fur Stat. quod nullus diftringat per averia caruce*, &c. Vid. Dier f. 312.

Now I fhall note fome general Observations as to Trespaffes by the Statute-Law.

If a Bill or Writ contain an Action at Common-Law, and the Declaration comprife matter upon the Statute, then the Plaintiff hath waved the remedy of the Statute, and fhall have Judgment at Common-Law, as Trespafs or Ravifhment of Ward upon the Statute is given. So a Man fhall have a general Writ of Trespafs for breaking his Park, where remedy is given by the Statute *de malefactoribus in parcis*. So one may have Trespafs at

at Common-Law, or an Appeal of *Mayhem*, upon the Statute. 2 *Rolls Rep.* p. 49. *Cranbank's Case*.

Recovery in an Action of Trespafs at Common-Law, is a good Bar in an Action of Trespafs on the Statute, as it shall bar in a Writ of Ravishment of Ward, so in Trespafs of Battery and Appeal of *Mayhem*, and in common Trespafs upon the Statute 5 *R. 2.* or 8 *H. 6.* or *malefactoribus in par-cis.* Hob. 94.

In Trespafs on the Stat. *R. 2.* Defendant saith, One *J. S.* was seized of; &c. in his demesne, as of Fee, and so seized before the Trespafs, in fee of one *B.* in Fee, and the Defendant as Servant, and by the Commandment of *B.* did the Trespafs, and gives colour by *J. S.* This was held a good Plea, for that the Defendant had shewed to the Court a lawful Title to the Land where the Entry is supposed: but it's no good Plea in this Action for the Defendant to say that the place where the Trespafs is supposed is his Franktenement, without conveying to himself a Title to the Land; and yet that is a good Plea in a general Action of Trespafs. *Nota diversitatem.* Keil. Ter. Mich. 18 *H. 7.* Case 1.

Stat. Marl. c. 4. West. 1. 16. 1 & 2 Ph. & Mar. c. 12. Dier 168. Pl. 20. & 177. Pl. 32. Trespafs for Beasts, *ad loca incognita fugata de Com.* in Com. Lib. Intr. 464. Breve *serra special*, and the place of taking is material, for distance of place makes the Offence: But if Land in one County be held of Land in another County, the Distress appertains to the Manor. Com. 204. b.

Before I come to treat of Writs of Trespafs, I shall cite two or three ingenious and useful Cases as to Trespaffes in point of Disturbance or Nuisances, which will be of good and daily use to inform a Man in such Cases what he may do, and yet not be a Trespasser.

Justifi-

The Law of Trespafs.

Justification by prostration for a Nufance.

1 *Rolls Rep.* 393.

If the Lord leave not sufficient Common, the Tenant shall have remedy by Affize, Trespafs, or Prostration. *Cok. Mag. Char.* 88.

If one make a Ditch, or raife a Bank, to hinder my way to my Common, I may juftifie the throwing it down and filling it up. *Stiles Rep.* 470. *Williamson's Case.*

I may enter into another Man's Land to throw down a Nufance; as, Water runs by the Land of *M.* and *M.* stops the Water-course, so that it furrounds my Land, I may enter into his Close, and abate this. 2 *Rolls Abr.* 565. 9 *Rep. Baten's Case.* Or stops the Water to a Mill. 9 *Ed.* 4. 35. Nufance Executory may be abated. 3 *Bulstr.* 197. *Morrice's Case.* 5 *Rep. Penruddock's Case.*

If a Man juftifie the Prostration of a Nufance, and that he was poffeffed for years, he ought to fhew that it continues. 3 *Bulstr.* 198.

If one hath Land adjoyning to my Land, and levieth a Nufance, I may enter upon the Land, and abate the Nufance. 9 *Ed.* 4.

A Traveller may break a new Gate fet up in the King's Highway where none was before. *Car. B. R. Haywood's Case.*

C A P.

C A P. V.

Of Writs of Trespass, and their Forms; and how and where the Writ is abated.

A Writ of Trespass lies for divers things which are not in the Register; as, for a Parrot, Poppinjay, Thrush, &c. *Crok. Eliz. 770. Barham's Case.*

As for the form of words, *vi & armis*, enough hath been spoken in the third Chapter; and where Writs may be *contra pacem*, and yet without *vi & armis*.

The form of the Writ for a live thing, as an *Abduxit*. Horse, &c. is *ceperunt & abduxerunt*; and for a *Asportavit*. dead thing inanimate, *ceperunt & asportaverunt*.

If it be for dead Chattle, the Writ must say *ad Ad valenciam. valenciam*; and for live Chattles, *pretij. Nat. Br. Pretij.* 88. b. *Dier 121. b.* But for pulling down an House it need not be said *ad valenciam*. *Stiles 385. Rawley's Case.*

Where the Writ is brought for one thing only, ^{Writ of one thing, or for several.} there mention is made in the Writ of the nature of it: but when the demand is made of divers things, it is *de quibusdam bonis & catallis*. *Crok. Jac. 307. Clyson and Procter.* The Writ was *bona & catalla* of the Defendant *cepit*, &c. and the Count was of a Bale of Woad, and the Writ abated. *Keiloway Trin. 13 H. 7. Case 1.*

The Clerks have invented *ac etiam Bille's*, for *Ac etiam Bille.* the avoiding of the Statute of 13 Car. 2. c. 2. which requireth the Cause of Action should be specified, or else no Special Bail, unless the Sum be above 40 l. and when no Special Bail is to be put in, no *ac etiam* ought to be.

For

Contra Pacem.

For a Trespas done in the time of Queen Elizabeth, and concludes *contra pacem dict' Dom' Regina & Regis nunc*: It was moved in Arrest of Judgment, That a Trespas committed in the time of Queen Elizabeth may not be *contra pacem* of King James. But Judgment *pro Quer'*; for *contra pacem Regis nunc*, is Surplufage. With this agrees the Resolution in *Siderfin*, p. 253. The Writ was, *contra pacem Dom' Regis nunc*, when the Trespas was committed in the former Reign. This is form, and a Writ of Error lies not for this: But,

If part of the Trespas be committed in the time of the Queen, and part in the time of the King, it must be alledged to be *contra pacem* of both. 1 *Rolls Rep.* 259. *Cuddington versus Wilkins.* *Crok. Jac.* 377.

In an Action of the Case *vi & armis*, it's not needful to conclude *contra pacem*: but it must be in an Action of Trespas *vi & armis*. *Stiles Rep.* 405. Yet good enough after a Verdict, without *vi & armis*, or *contra pacem*, by Stat. 16 & 17 Car. 2. cap. 8.

Presidents and Forms of *contra pacem*.

Contra pacem nuper Regis. *Vet. Intr.* 220.

Contra pacem H. nuper de facto, non de jure Regis. *Ra. Entr.* 578, 616.

Contra pacem modo Regis, & nuper Regis. *Ra. Entr.* 529. *Co. Entr.* 656. *Plowd. Com.* 41. b. *Wymbish and Talboys.*

A Man may have a Writ of Trespas for divers Trespases; as, for breaking his Close, cutting his Trees, fishing of his Waters, battery of his Servants, &c. and all in one Writ. *N. B.* 86. *L.* 87. *G. Dier.* 70. *Pl.* 35.

Observe, Trespas is sometimes brought by Original Writ, and sometimes by Bill.

One

The Law of Trespass.

31

One is sued in Trespass by Original, and the Sheriff returns the Defendant *attachiat' est per catalla ad valenciam* 10 l. He ought to shew the *catalla in specie*; for the *catalla* by which the Defendant is attached are forfeit to the Queen at the day of the Return, if he make default. *Vid.* the form of the Entry, *Dier fo.* 199. *Pl.* 54.

Original General, and Count Special; as 5 *Rep.* 34. *Playter's Case.*

Note, In all Writs *Vi & armis*, Process of Outlawry lies by the Common-Law. *Plowd.* 228. b.

Note, Trespass *vi & armis* lies not in the County-Court; without *vi & armis* it doth. *Moul. Rep.* 215. *Wing and Jackson.*

Abatements of Writs of Trespass.

If the Plaintiff lays his Trespass before his Title alledged accrued to him, the Writ shall abate; as, in 1 *Leon.* p. 104. *Pawlet and Lawrence.* Vide *supra.*

Narratio variant from the Writ, and *Abatement per Misnomer.* *Ra. Entr.* 616.

Misnomer of one of the Defendants shall not abate the Writ. 8 *Rep.* 159. b.

Plaintiff declares against the Defendant *nuper de C. in Com' S. Chandler.* The Defendant pleads in Abatement of the Writ, That he the day of the Writ purchased was a Gentleman, &c. *Et hoc, &c. Per Curiam,* the Plea was ill, because he did not traverse that he was a Chandler. *Crok. Eliz.* p. Devent and Popham.

Trespass against T. for taking his Cattle. The Defendant pleads the Plaintiff was possessed of the Cattle jointly with another not named in the Writ, and demands Judgment of the Writ. The Plaintiff replies, the other was dead at the time of the Action brought.

The Law of Trespafs.

brought. *Per Cur.* a *Respondeas ouster* awarded; for the Defendant's demurring to the Plaintiff's Replication was only for delay. *Stiles Rep.* p. 102. *Scoble and Toley.*

The Defendant (after the general Imparlance) pleaded, that he and two others not named did the Trespafs, and so prays Judgment *de Billa.* A *Respondeas ouster* was awarded, and *per Cur'* the Defendant may after this plead the Release of the Plaintiff in chief. 1 *Keb.* 715. *Wright versus Bright.*

Two Joyntenants bring Trespafs, and one dies, all shall abate; *aliter* if brought against two Jointenants. *Crok. Jac.* 214. *Sir Oliver Leigh's Case.*

In Trespafs against two, if the Plaintiff confesseth they did the Trespafs severally, the Writ shall abate. 11 *Rep.* 5. b.

In Trespafs, after Pleint or Count made, the Writ purchased after such Pleint or Count shall abate. *Nota,* It is parcel of the Plea to say the Plaintiff hath declared. 5 *Rep.* *Sparrey's Case.*

If a Bill be fil'd in *Hillary-Term*, and declares that the Defendant had assaulted and beat his Servant, *per quod* he lost his Service from such a time to such a day, and continues the Loss and Trespafs till after the Action brought, the Bill shall abate. 1 *Rolls* 576.

If the words *vi & armis* be omitted, it shall abate, though after a Verdict *pro Quer'*. It is the essential part of the Declaration, which induceth to have a Fine for the King. Trespafs for taking away a Bag of Money, *vi & armis* being omitted, Judgment was reversed, that being assigned for Error. *Crok. Jac.* 526. *Willis and Neilder. Hill.* 13 *Jac.* *Welstead and Taylor.* But by the Stat. 16 & 17 *Car.* 2. c. 8. after a Verdict Judgment shall not be stayed or reversed for the want of the words *vi & armis* or *contra pacem.*

The Law of Trespafs:

13

If Trespafs be laid before the Title of the Plaintiff accrue, though it appear upon Evidence only, the Writ shall abate. *Vide supra, Pawlett and Lawrence's Case.*

One Tenant in Common brings Trespafs for entering into the Land; it's a good Plea in Abatement to say that the Plaintiff was Tenant in Common with a Stranger. *Crok. Eliz. 554. Deering's Case.* So in Joyntenants.

Trespafs against one; the Defendant pleads in Abatement, That he with others did the Trespafs. It was prayed, that he having confessed the Trespafs, Judgment final should be given: But the Court granted a *Respondeas ouster*. The Issue may as soon be tryed as a Writ of Enquiry of Damages. *Siderfin 190. Wright and Bright.*

In all Actions of Trespafs which are grounded upon a *Tort*, the Death of the one shall not abate the Writ of the other: But if it be founded on Contract, as *nil debet, nung; receivor*, there by the Death of one the Writ abated against the other. *Raym. 131.*

D

C A P

C A P. VI.

Of Declarations in Trespas; and therein of laying the Action as to Time and Place. Of the former Pretij and ad valenciam, Vi & armis, and of laying the Plaintiff's Property. Of variance between the Writ and the Declaration. Of Certainty as to Words, and Anglice's: Things, their Nature, Kind and Number. Of expresse Averment. Of the forms of alia Enormia, and actunc & ibidem, how extended and expounded, and of the Plaintiff's making a Title in his Declaration; And likewise of the Simulcum, and the Continuandoes.

Of laying the Action as to { *Place,*
Time.

Trespas *quare Clausum fregit* must be laid in the County where the land lieth, for they are local: but as to transitory Actions, as for beating a Man, &c. the wrong being done in one Town, the Plaintiff may alledge it to be done not only in another Town, but another County; and if the Plaintiff lay the thing to be done in another place, the Defendant may not traverse, and say it was done in another place, and not in the place set down in the Declaration, unless there be special cause of Justification which doth extend to the place; as, in the Case of a Constable arresting a Man, and of Officers for any thing done about their Offices, or when an Action is brought against a Man for doing any thing under any Act of Parliament. Co.

Lit.

Litt. 282, 283. But generally transitory Actions are used to be laid in that County where the Cause of Action did first arise.

Where a County is in the Margin of a Declaration, and the Trespass is alledged to be done *apud D.* and doth not shew in what County *D.* is, yet it is well enough, for it shall be intended to be in the same County which is in the Margin; *aliter* if it be in an inferiour Court, though the Vill be in the Margin, yet he must say *infra Jurisdictionem Curiae*. *Crok. Jac.* 95. *Quarles and Searle*.

If one beat my Servant in one County, and I lose my Service in another, I have my election where to lay my Action. So of retainer in one, and departure in another. *1 Keb.* 145.

If Trespass be done in divers Towns in one Shire, they may be all joined in one Writ, (*viz.*) who *vi & armis* the Closes of the Plaintiff at *H. B.* and *C.* have broken. *1 Brownlow Rep.* 196.

Trespass for cutting up two *Testa, Anglice* Flood-gates, in *Staff.* whereby the Water could not come to his Mill in *Chester*, the Action, according to *Bullwer's Case*, is well brought. *1 Keb.* 139, 145. *Slaney and Egerton*.

If one procure or command another to do a Trespass in another County, the Action shall be brought against the Commander or Procurer where the wrong was done. *Dier f.* 39. *Pl.* 56.

If a Man take Goods in one County as a Trespasser, and carries them into another County, Action shall be brought in the first County. *Dier f.* 40.

As to the Time of laying the Action.

As to the Statute of Limitations, *vid. infra sub titulo* Pleadings.

Dz

Tref

The Law of Trespafs.

Trespafs may be laid before or after it was done, so it be before the Action brought; as, if it were done the 4th of *May*, and the Plaintiff alledgeth the same to be done the 5th of *May*, or the 1st of *May*, and upon Evidence it falls out that the Trespafs was done before the Action brought, it's sufficient. 19 H. 6. 47. 5 Ed. 4. 5. 21 Ed. 4. 66.

In Trespafs on the Statute of Monopolies, made An. 21 Jac. Plaintiff declares; That 13 July 14 Car. Proclamations were made of Wines, by colour of which the Defendant, 7 Jan. 20 Car. procur'd the Plaintiff to be imprisoned, and that afterwards the Defendants, *postea*, *scilicet* 14 July 20 Car. threatned the Plaintiff to imprison him, so that he durst not go about his Affairs. *Per Cur'*. The *postea* in the latter place must refer to the time immediately precedent, and cannot leap over that, and refer to the time of the Proclamations; and the time brought in by the *scilicet* was repugnant and void, and the Declaration stands as if no such time had been alledged, and good after a Verdict. *Allen* p. 22. *Sims* and *Gregory*.

Bill is filed Hill. 18 Jac. and the Battery is supposed 20 Jan. 17 Jac. and the loss of Service to be *per magnum tempus*, *scilicet a præd'* 20 March 17 Jac. *usq;* *primum Martij* following, which was in March 18 Jac. and this is to the time after the Action brought, and Damages are given for the time after the Action brought. *Per Cur'*. This is naught, and is not aided by intendment, or amendable; for here the point of the Action is the loss of the Service. *Crok. Jac.* 618. *Hanbury* against *Ireland*.

Trespafs for taking his Beasts, 22 Nov. 39 Eliz. Defendant justifies for Damage-feasant in his Freehold. Plaintiff replies, long time before the Trespafs the Parson of D. was seized of such Land in Fee,

Fee, and of Common for 100 Sheep appertaining, and 4 Nov. 39 Eliz. lett that Land and Common to the Plaintiff for years, and so he put in his Beasts; it's an ill Replication, for the Plaintiff entitles himself by a Lease 4 Nov. 39 Eliz. which was long time after the Trespas supposed in the Declaration (Q. Eliz. beginning her Reign 17 Nov.) But upon Issue and Verdict, it's aided *per Stat. Jeoffayl*, it being a mis-pleading. *Crok. Eliz. 722. Bushwood and Pond.*

Plaintiff declares, Whereas he was possess'd of a parcel of Land adjoining to a certain River, from the 20th of May 29 Eliz. until the day of the bringing this Writ, the Defendant had the said 20th day of May stop't the said River with Loads of Earth, and so it continued till the 14th day of February, *per quod* his Land was drowned. In arrest of Judgment it was moved, that the Plaintiff hath made Title to the Land from the 20th day of May, so as that day is excluded, and the Nufance is said to be made the 20th day, and so the Nufance was before the Plaintiff's Possession. *Per Cur'*. Though the stopping was made before the Possession, yet the continuance of the same is after, and a new wrong, and the Action lies. 2 Leon. p. 103. *Washburn and Mordant.*

Trespas was laid with a *continuando usq; diem impetrationis brevis* (viz.) 14 diem Febr. anno 17. whereas the Writ bore *Teste 12 Octob. anno 17.* which was before the day alledged for the time of the continuance; yet the Plaintiff after a Verdict had his Judgment. 20 H. 6. 15.

In Trespas *per quod servitium amisit per longum tempus videlicet per spacium sex mens' tunc prox' sequen'*, and the Original bore *Teste* within the six six months; and after a Verdict, the Plaintiff had Judgment, for the [*videlicet*] was more than needs, and it shall be taken to be out of the consideration

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of the Jury in taxing the Damages. *Hob. 284. Hunt and Lawring.*

In Battery of his Servant, the Plaintiff shall recover within six years before the Action. *Sir John Lake's Case, cited 1 Keb. 11. In Bradford's Case.*

The Court will take notice of the day in a Trespas, to support a Judgment, but not to destroy it. *2 Keb. 287. Howard and Gregg.*

If Trespas be supposed to be done after the Action brought, it's not cured by *Non cul'*, unless the Judge will permit the Jury to find the matter specially, that the Defendant is guilty of the Trespas such a day, which is before the Action brought. *Siderfin 308.*

*Where it shall be said pretii, or ad valenciam,
and where not.*

If the Declaration doth not say *pretii* for live Cattle, and *ad valenciam* for dead Cattle, Judgment was revers'd. *Stiles Rep. 182. Dell and Browne.* Yet now it's adjudged, that if *pretii* or *ad valenciam* be omitted, that after Judgment it is aided by the Statute of *Jeofayls.* *Siderfin p. 39. Usher and Bushel.* So in Judgment by default. *1 Keb. 552. Taylor and Hardye.*

Of Beasts *capt' fugat' & imparcat'* he shall say *pretii*, for that *cepit* implies he had gained a Property.

Argentum cepit & asportavit, he shall not say *pretii*, for the Money comprehends the Value: If Pieces of Plate, *aliter*; *Auri tot florenos*, there it shall be said *pretii.* *Reg. 182. b.*

In Trespas *quod 10 equos ceperunt abduxerunt & fugaverunt*, by which he lost 100 Loads of Hay, not saying *ad valenciam* or *pretii*, and not saying of what value the Horses or Hay were,
but

but concludes generally *ad valenciam* 100 l. *Per Cur'*. It's ill; after a Verdict it might have been good. 1 *Keb.* 248, 257. *Fenn and Driver*.

The Declaration is, *pedibus ambulando*, without saying *ad valenciam*: Yet if it be so in the Writ, it's good. *Siderfin Trin.* 15 *Car.* 2. *Hardy and Taylor*.

Trespass *quare* 1 *May* 29 *Car.* 2. *clausum fregit & intravit & fodit terram & asportavit 20 carectar' terr' & soli valor 40 s. continuando transgression' præd' quoad fossion' caption' & asportation' terre & soli præd' à præd' 1 die Maii usq; 1 diem Junii tunc prox' sequen' ad damnum 30 l.* Judgment pro *Quer' sur Demurr'* and Writ of Enquiry, entire Damages, and adjudged ill, because there is not any value of the Soil taken away during the *Continuando*. 2 *Levin.* 230. *Stride and Hunt*.

Vi & armis. Vide supra.

Vi & armis is necessary in the Declaration of Assault, and entring into his House, and taking his Goods, and is not aided by the Statute of *Jeofayles*. *Crok. Jac.* 443. *Taylor and Welsted*. It's aided by the Statute 16 & 17 *Car.* 2. cap.

Defendant pleads to the *vi & armis* *Non cul'*, and saith not *Et de hoc*, &c. it's form, and the Plaintiff shall not take advantage of it in demureer without shewing it. *Siderfin* pag. 216. *Thacker's Case*.

In *Com' Banc'* the first Declaration did not contain *vi & armis*, the second Declaration after the Impar lance did. It was Error. For the first Declaration is most material, and so the first Declaration *quod cum* he assaulted, was Error, though the second Declaration was good. 2 *Rolls Rep.* p. 107. *Foord and Foord. Crok. Jac.* 536. *mesme Case*.

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*How and by what words Property must be laid in
the Plaintiff in his Declaration.*

In Trespas for Goods, the Declaration ought to lay the Property of the Goods in the Plaintiff at the time of the taking; as, *cepit, &c. tres Tassas, Anglice Sheaves, (ipsius querentis)* 3 Bulst. 303. *Whiteman's Case*; and so the Timber (*ipsius quer'*) *Stiles Rep. 53. Wood and Salter*. If one declare that the Defendant *Equum cepit a persona querentis*, and saith not *Equum suum*, it's not good. 2 Crok. 46. *Yel. 36. 1 Brownl. Rep. 192. Purcell and Bradley*.

Trespas for taking away Goods, and doth not say *sua. Per Cur'*. This is ill. But *in custodia sua existen'* were sufficient. 3 Keb. p. 100. *Gallant's Case*. Trespas for entring the Plaintiff's Close, and so many Cartload of Corn, Hay, &c. not saying (*ipsius Querentis*) *cepit & asportavit*, it's ill. So in *Simms's Case*, Trespas of breaking the Plaintiff's House, and taking away divers Goods, and not said *sua*, and Judgment was stay'd: But in that Case, had it been *ibid. crescen'*, it would be intended *sua*; but being *carectat'*, it's severed, and may be a Stranger's Goods. Judgment was arrested. 3 Keb. 524. *Holland and Ellis*.

Trespas *vi & armis* for taking the Mare *ipsius Querentis necnon bona & catalla sequent'* (*viz.*) and sums them up, but doth not say they were the Goods *ipsius Quer'*. Defendant demurs thereupon; and resolved the Plaintiff may have Judgment for the Mare, and release the Action for the residue. *Raymund 395. Cutforthay and Taylor*.

Trespas of digging his Soil, and carrying away 20 Loads of Soil, and said not *ipsius Querentis*, it's ill. *Brewer's Case*, cited 3 Keb. 519, or 529. in *Terry's Case 589*.

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In Trespas by Infant *per* Guardian for cutting Trees (and saith not whose, nor in whose Possession) and for carrying away the Wood of the said Plaintiff. *Per Cur.* this is well enough; especially Not Guilty being pleaded to the cutting. 2 *Keb.* 24. *James and James.*

Trespas for taking a Hook, and saith not *Hammum suum*, and so hath not shewed in his Declaration that the Hook was in his Possession, it's ill. But the Defendant pleaded a Way over the Plaintiff's Land, and the Plaintiff endeavoured to cut his Harness, and he took the Hook *extra Possession* of the Plaintiff; now the Defendant's Plea hath made the Declaration good. *Siderfin* 184. *Brook's Case.*

In *B. C.* the Writ was, *Bona & Catalla sua cepit*, and the Declaration was *unum Bovem* without saying *suum*, and held good in the Common Bench, for there the Writ is parcel of the Declaration. *Siderfin* p. 184. *Brook's Case*, and fo. 187. *Jones and Pritchard.*

Of Variance between the Writ and Declaration.

The Writ was, *Quare Clausum fregit*, and the Plaintiff declares of divers Closes. *per Rolls* it's well enough; for the Word *Clausum* is *Nomen aggregativum*, and may contain many Closes. *Stiles Rep. Burrel and Lancaster.*

In the Writ it was, *Bona & Catalla cepit*, and the Declaration was, (*videlt.*) *unum Discum Plumbi*; after Verdict it's aided *per Stat.* of *Foefayles*, for for that part there is no Original. *Lit. Rep.* 311. *Furner and Disbery. Vide a Cause* somewhat like this in *Winch Rep.* 35. *Gell and White.* The Declaration was, *Quare Vi & Armis Bona & Catalla sua ceperunt* (*viz.*) *tertiam partem unius Dishei* part of a Dish

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Dish of Lead Oar. This was thought a Variance between the Writ and the Declaration, and the Declaration is contrary to it self: For if in a Replevin the Writ is *de Bonis & Catallis*, and his Declaration is of taking an Horse, this is not good: Yet it's aided after a Verdict *per Stat. Jac. 1.*

The Bill is against six, and the Declaration against seven; this is Surplusage as to the Seventh, because there is no such Person, and good for the others. *Siderfin 253.*

The Writ supposed the Trespas to be done *apud H.* and the Declaration supposed the Trespas to be *apud B. in H.* and after Verdict the Judgment was stayed for this Variance. The Difference is, where there is no Original it's aided by the Stat. 18 *Eliz.* *Aliter* where there is an Original and this varies from the Declaration. *Cro. Eliz. 121. Everard and Green. Cro. Jac. 664. Hendy and Thorst.*

In *C. B.* the Plaintiff declares of a Battery done 1 *May*, to his Damage of 40 *l.* The Defendant imparles till the Term following, at which time the Plaintiff declares of a Battery done 2 *May* in the same Year, (and upon this Roll it is not entred *prout alias patet*) and Damage 100 *l.* and on not Guilty, Judgment *pro quer.* The Court inclined that it was well given in *C. B.* the first Declaration, *i. e.* before the Imparlance, is the chief Record. 3 *Bulstr 227. Millward and Maby.*

In Trespas, the Writ was, *Quare Clausum fregit*, and the Count was, *Quare Clausa fregit*; and for this Variance Judgment was reversed.

The Trespas in the Declaration was supposed to be in *London*, and the Writ was directed to the Sheriff of *Middlesex.* This Variance was held to be Error, *Cro. Jac. p. 479. Pollard and Blight*, for it's a vicious Original. But had it Been by Bill it had been aided by the Statute; for this Bill had been

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been as no Bill at all. *Cro. Jac.* p. 654. *Caltbrop* and *Culpeper*. *Vide* a Case as *Everard* and *Green*. in *Cro. Jac.* 664. *Hendy* and *Thirst*.

Of certainty as to Words or Things, the Nature, Kinds and Number of them in Declarations.

Trespas *quare Clausum fregit, & spinas suas ad valentiam, &c. succidit*, after Verdict it was moved in arrest, That the Declaration was not good, because he doth not shew the quantity of the Loads, and so uncertain, as in *Playter's Case*. But it was adjudged good because of the many Presidents shewn in maintenance thereof. *Cro. Jac.* 345. *John's* and *Wilson*. But this is no great Satisfaction to an inquisitive Mind.

Plaintiff declares for taking away six Mares and Colts, and shewed not how many Mares and Colts particularly, and Verdict *pro Quer.* but *nil cap. per Billam*. *Stiles* 416. *Hudson* and *Dickinson*.

Declaration for taking Cattle, or Cheeses, or *Pullos Equinos*, not shewing the Kind or Number, is uncertain. 3 *Keb.* 507.

Trans. quare Diversas Testas (Anglice Earthen Pots) ipsius Quer. cepit, it's not good for the Uncertainty; as a Trespas for an Heap of Stones, for a Cart-load of Stones had been good. *Palmer's Rep.* 447.

Trespas for entring his House and taking divers Goods, & *inter alia, unam parcellam pensaris Lanaris (Anglice a Quantity of Woollen-Cloth)* after Verdict *pro Quer.* and entire Damages, Judgment was stayed for the uncertainty of the Quantity, what it is. 2 *Levinz* 195. *Wade* and *Haltber*.

As

The Law of Trespas.

As to Kind or Species.

De asportatione of Beams, Scales and Weights, and doth not shew what Weights; and ill. *Stiles* p. 354. *Webb* and *Washborne*.

An Action for taking away two Trunks with Cloaths, and said not what Cloaths; and yet held good. *Stiles* Rep. 354. Yet there adjudged Trespas *de asportatione* of five Locks and Keys, it's ill. *Stiles* *ibid*.

Plaintiff declares of breaking his Close and eating his Grass *cum quibusdam Averijs*, and saith not what Cattel; *per Rolls* it's good enough, especially after Verdict: For this Action is brought for Damages. *Stiles* Rep. 170. *Brook* and *Brook*.

Plaintiff declares for taking away forty Loads in Straw; and it appears not whether they be Horse-Loads or Cart-Loads: *per Glin.* it shall be intended Cart-Loads. *Stiles* Rep. 466. *London* and *Wilcox*.

Trespas *quare Herbam & Blada cepit*; 'twas moved in arrest of Judgment, That no particular Grain or Species was expressed. So in a new Action for the same thing, this would be no Plea in Bar by Averment; which the Court agreed; yet the Species must be given in Evidence. 3 *Keb.* p. 42. *Mascue* and *Shepard*.

Trespas *quare Clausum fregit, & Arbores succidit, ad valentiam* 10 l. The Defendant demurred generally. The Plaintiff prayed his Judgment for breaking his Close: But as to the other, the Declaration was insufficient; because not expressed what Trees. 1 *Ventr.* 53. *Tomlinson* and *Hunger*.

Trespas *Quare Clausum fregit, & diversas petias Marbemi cepit, &c.* Judgment by Default; upon the Writ of Enquiry returned, the Judgment

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Judgment was stayed for the uncertainty of the Declaration. 2 Ventr. 262.

Trespas *Quare percussit Accipitrem*, and doth not say what kind of Hawk, yet it's good. Cro. Car. 18. Sir Francis Vincent's Case; it is but one, and not like Playter's Case, 5 Rep.

Trespas for entring his House and breaking *duas Cistas*, and for taking *diversa genera apparatusum in Cista præd. existens*. though the Words *diversa genera apparatusum* are too uncertain in themselves, yet being referred to a Chest wherein they lay, they are reduced to sufficient certainty; but because it was in *Cista præd.* in the Singular Number, it's altogether uncertain. Allen's Rep. Hill. 22 Car. 1. B. R. Vincent and Furse.

Trespas for carrying away ten Pieces of Timber, is certain enough. 1 Keb. p. 34. Walcott and Tapping.

Trespas for taking and carrying away eight Firkins or Pots of Butter; after Verdict it shall be intended *Synonima*. 1 Keb. 43.

As to Words and Anglices.

Declaration for taking away *quinque Instrumenta Ferrea*, *Anglice* Fetters, it's naught; there being a proper Latin Word for Fetters, *viz. Compedes*, and the Office of an *Anglice* is to help Words of Art. Stiles Rep. p. 37. Yet in 3 Keb. 635. in Tompkin's Case, Trespas was brought *de 100 Yards Panni Pendent. Anglice* Hangings, and adjudged good, though *Peristroma* signifies Hangings.

Declaration *pro uno Pullo*, intending a Colt, not good, though there had been an *Anglice* with it. So *quoddam Instrumentum, Anglice* a Grid-iron, is not good, because the Latin imports no such thing; if it had been *quoddam Instrumentum Ferreum*

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Ferreum it had been good.* *Siderfin.* p. 60. *Ellis* and *Tarrow.* *Instrumentum Ferri, Anglice* an *Horse-Lock*, is ill. *Stiles Rep.* p. 327.

Trespafs for taking Goods, the Plaintiff counts *de una Satagine, Anglice* a Frying-Pan. Verdict *pro Quer.* It was moved in arrest of Judgment, because it ough to be *Sartagine*: But it was adjudged *pro Quer.* for if *Satagine* signifies nothing, then no Damages was given for it; and the Difference was taken where the Word signifies another thing, there it is ill; but where it is insignificant there it doth not vitiate. *Raym.* 15. *Smith* and *Warner.*

When a Man expresth in English a thing tortiously taken, and Englisheth this, if the Latin word had not such Signification with the English it's not good; but if he declares upon a Latin word which had not any perfect Signification, yet upon the Englishing of this, by which the meaning of the Plaintiff doth appear to the Court, the Plaintiff shall recover, and the Jury shall be intended to give Damages according to the Declaration in Latin, not having respect to the Englishing: But when there is a proper Latin Word to express the thing taken, if the Plaintiff declare by another Word it's not good *per Fenner, Telverton* and *Williams* (but *Popham* thought this too nice and to tend to the Subversion of divers former Judgments) therefore a Trespafs *de una Hama (Anglice* a Crow of Iron, was adjudged not good; *de Caruca cum apparatu* is good.

Trespafs *pro decem Caponibus (Anglice* Capons) & *Avibus Domesticis (Anglice* Poultry) in *Taylor's Case*, 9 *Car.* 1. adjudged not good. *Stiles Rep.* 37. *Barker* and *Martin.* *Cepit & asportavit decem Coria (Anglice* Hides) is good; *Stiles Rep.* 64. *Pool* and *Coply.* *Unum Lenat (Anglice* a Mat) and there is no such Word as *Lenat.* *per Car.*

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Cur. it's all one as if it had been left out, and so no Damages given for it. For taking away *unum Adustum Ferreum*, which signifies nothing, *per Cur.* then no Damages are given for them. *Tria Suspendia* (*Anglice* Pot-hooks) is good. *Stiles Rep.* p. 95.

Trespafs *pro quinque peciis Stanni* (*Anglice* Pewter-Dishes) *per Rolls* the *Anglice* is void, and then the Latin is good, and it matters not what pieces they be, for it is *ad valentiam*, which makes it certain enough to the Jury. *Stiles Rep.* 102. *Levinz and Gamble.* Trespafs *de uno Ephipio*, it's good enough. *De Equo & Ephipio ad valentiam*, it's good enough, and goes to the whole. 2 *Keb.* 483. *Hill and Crashaw.* Trespafs of 4 *Bovil. vocat.* Steers or Bullocks, the English was void, and Judgment *pro Quer.* 3 *Keb.* 646, 650. *Wood and Withers.*

Declaration that the Plaintiff took away *decem Velamina* (*Anglice* Coifs) *Pilum a Cap.* *decem Colores* (*Anglice* Neck-bands) *de uno Instrumento* (*Anglice* a Plate for a Jack) *pro uno operimento* (*Anglice* a Rale). *Per Rolls*, we must not be too curious, and therefore a Description with an *Anglice* may serve. *Stiles Rep.* 125, 313. *Lloyd's Case.* But for *Quoddam Instrumentum Ferrei* (*Anglice* a Gridiron) Judgment was reversed. 327 *Stiles.*

But I shall cite no more of this Stuff; if the Student cannot find a proper Word, let him coyn one, or make an apt Description.

Of express Averment.

In Trespafs *Vi & Armis* there must be an express Averment of the Force, and not whereas there was such a Force. *Stiles p.* 353. and so in *Dison and Bartne's Case*, *Stiles p.* 133. the Declaration

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ration was, *quod cum, &c.* which was no direct Affirmative, and Judgment was arrested. So in Trespafs for an Assault, the Plaintiff declares, *quod cum* the Defendant such a Day and Year assaulted the Plaintiff; the Declaration is erroneous. 3 Crooke 507. *Burser's Case.* 2 Bulstr. 215. and by *Sanders*, *quod cum* in Trespafs makes it naught after a Verdict, and that a general Demurrer to such a Declaration is sufficient. Neither is it good in Battery. So 1 Keb. 130. *Shepard and Tompkins.* Vide this Point of the *quod cum, &c.* well argued and resolved in 2 Bulstr. 214. *Sherland and Eaton.*

Of alia Enormia ei intulit how to be extended.

Trespafs *quare Clausum fregit & alia Enormia ei intulit*, this difference was taken neatly; When Damage ariseth *ex turpi Causa* (as for Injury done to the Daughter of the Plaintiff under Colour of Marriage-Courtship) it may be given in Evidence upon such general Declaration of *alia Enormia*; but in all other Cases of Trespafs, the special Matter for which Damages shall be given ought to be pleaded; as Trespafs for taking an Horse, no Evidence shall be for other Matter than what is exprest in the Declaration. *Siderf. p. 225. Mich. 16 Car. 2. B. R. Sipporn and Bassett.*

Ad tunc & ibidem how expounded.

Plaintiff declares that the Defendant 31 Maij 13 Jac. apud London. in such a Parish, assaulted him, and *adtunc & ibid.* beat and wounded him, and a Bag of the value of twelve Pence from the Plaintiff with an hundred Pounds in Money therein took and carried away, *& alia Enormia, &c.* and doth not say, *tunc & ibid. cepit, &c.* and so no
time

time and place mentioned of the carrying away,
Ec. but *per Cur.* it's well enough; for (*Et*) ac-
 couples it with the time and place of the Battery.
Cro. Fac. 443. *Taylor and Welstead.*

Declaration that the Defendant *Die*
Augusti assaulted him, omitting the Day of the
 Month, though the Declaration on the Imparlance-
 Roll was perfect, and Judgment given for the
 Plaintiff; but it was adjudged to be Error and not
 amendable, *2 Rol. Rep.* 152. *Bicroft's Case.*

The Plaintiff declares against two Defendants,
 against one of them for an Assault and Battery,
 and against the other for taking away his Goods.
Per Cur. the two Defendants cannot be joined to-
 gether in one Action, because the Trespafses are of
 several Natures and against several Persons, and
 the Parties cannot plead to this Declaration. *Stiles*
Rep. 153. *Cutsworth's Case.*

Trespafs of a Judgment in *Hull-Court*, the
 Case was this; the Plaint was entred 15 *Dec.*
 2 *W. & M.* and Process returnable *ad prox. Cur.*
 28 *Jan.* at which Court the Plaintiff counts that
 the Defendant erected an Edifice there, by which
 the Lights in the Plaintiff's ancient Messuage were
obstupat. & obstruct. usque Levationem querelæ &
adhuc existunt. The Defendant there pleads *Non*
Culp. and the Cause continued there until 7 *May*,
 and then it was removed by *Habeas Corpus* and
Certiorari in *B. R.* & *super hoc ulterior processus*
in eadem Curia cessavit, and after it is entred there
postea ad Cur. Villæ prædict. tent. coram Majore,
&c. and saith not at what Day. Comes the Plain-
 tiff and brought a *Procedendo*, and a Trial there
 was and had, and Verdict and Judgment *pro Quer.*
 Error assigned, that it appears by the Record that
 the Action commenced 15 *Dec.* when the Plaint
 was levied, and the Declaration was not till the
 28th of *January*, and then he counts of the con-
 tinuance

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tinuance of the Nufance *adbuc*, and fo counts for Damages after the Suit commenced, and fo they are given by the Jury generally, and by it for more time than they ought to have done. But *per Cur. adbuc* in the Count refers to the time in the Plaint, and the Count and the Plaint to this Purpose are all one; and the Presidents are *adbuc debet*, *adbuc detinet*, *nondum solvit*, in cafe for ftopping a Way; by which *adtunc* & *adbuc* he loft his Way. *Co. Entr.* 11. b. 13. a. 14, 15. 3 *Levinz* 345. *Carter and Canthorp*.

In Trespafs in the Common Bench the Declaration muft be, *Attachiatus fuit ad respondend.* if it be *Summonitus* it is but Form, and aided after a Verdict. 1 *Cro.* 41. 2 *Cro.* 85, 108.

In the King's Bench the Form is, A. B. *queritur de C. D. in custodia Marr. Marefch. &c. de eo quod ipfe primo die, &c. Vi & Armis.*

Form of Declarations in the { King's Bench,
Common Pleas,
Exchequer.

Modus Intrandi 377, 378.

The Plaintiff need not make any Title in his Declaration in Trespafs, the fame being a Poffeffory Action; as Trespafs *quare fœnum suum cepit*, he need not fay this Hay was Tythe belonging to his Farm, and if he do it's Surplusage; but if he do make a Title in the way of Evidence, he ought then to pursue the fame and make it good. 2 *Bulft.* 288. *Walmore and Bamford*.

Simul cum.

Trespafs by the Defendant *simul cum alijs. Ra. Entr.* 615, 619, 650. *Co. Entr.* 647. 8 *Rep.* 107.

Trespafs

Trespafs by the Defendant *simul cum Uxore.*
Rx. Entr. 648.

Simul cum quodam J. S. Clausum suum fregit; and of the Plaintiff's own shewing it appears the Action ought to be brought against another not named in the Writ; yet if Verdict pass it's a *Feofayle*. If the Declaration were *cum quibusdam aliis ignotis*, it's good. *1 Leon. 41. Henly and Broad. Stiles p. 20. Barker's Case.* It may be the Plaintiff cannot arrest the other Trespaffors; and will do it when he can, and he may well proceed against them at divers times as he can take them; but if he have Satisfaction from any one of them, he cannot proceed against any of the rest. *Id. ibid.*

But if in Trespafs against one, who pleads that the Trespafs was done by himself and one *B.* to whom the Plaintiff hath released, and the Plaintiff traverse the Release, in that case, forasmuch as the matter doth not appear upon the Plaintiff's own shewing, but comes in on the part of the Defendant and not denied by him, the Declaration is good enough, *1 Leon. p. 41. Henly and Broad,* and the Action shall not abate. *Hobart p. 199.*

If a Man bring an Action of Trespafs against *A. quod ipse simul cum B. & C.* did the Trespafs, and doth not sue them all, his Writ shall abate: as if four commit a Trespafs (which is in its nature joint and severall) yet if the Plaintiff will bring his Action against one only, and declare that he with the other three did the Trespafs, his Action shall abate, it appears of his own shewing. *Hobart p. 164, 199.*

Trespafs against *J. S. simul cum alijs*, not naming them, is good. *Stiles Rep. 15. Tory's Case, p. 20. Barker and Martin.*

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It was moved for the Plaintiff, that a Person named in the *simul cum* being a material Witness, might be struck out, and it was granted. And by *Keeling*, if nothing was proved against him, he might be a Witness for the Defendant. *Modern Rep. p. 11.*

Form of a Declaration in the *simul cum*, wherein the Place is expressed where the Trespafs was committed, according to a Rule in Court. *Mod. Entr. p. 383.*

Continuando.

Disseisee shall have Action of Trespafs against the Disseisor, and recover his Damages for the first Entry without Re-entry; but after Re-entry he may have an Action of Trespafs with a *Continuando* and recover as well for all the mean occupation as for the first Entry. *Co. Lit. 257. a. f.* But if the Estate be determined by Act of God or Limitation, he shall have his Trespafs with a *Continuando* without Re-entry. *2 Rolls Abr. 550.*

Trespafs *quare Clausum fregit* 20 Junij, Anno 3 Jac. *continuando* until 6 Nov. puis general Pardon pardons all before 25 Sept. yet the Entry (after Verdict *pro Quer.*) was *nil de fine quia pardonatur*; for the first Entry in the Trespafs being only *vi & armis*, this being pardoned, all that depends upon this is pardoned; for the first Entry makes the Trespafs, and the *continuando quoad depasturat.* is added to increase Damage. *Yelv. p. 326. Strickland and Thorp.*

Trespafs for breaking his Close, spoiling his Grass, turning up his Soil and 200 Posts in *solo fixas eradication. & abcarriation. continuando transgres. præd. usque* such a Day after, and upon *non cul.* Verdict *pro Quer.* and enters Damages and Judgment *pro Quer.* and Error brought because no

continuando can be of the Posts. *Curia contra.* When the *contin.* is of the Trespas *præd.* generally, and the Trespas consist of several parts, and of some of them a *continuando* may be, and of some not, the *contin.* refers only to those of which a *contin.* may be, and not to the others; but if the *continuando* had been particularly of the Posts, it would be otherwise: and Judgment was affirmed.

3 *Levinz* 93. *Gillam and Clayton.*

Trespas for Piscation in his several Pischary, and taking 100 Bushel of Oysters at one Day, the Piscation, Caption and Asportation of the Oysters *diversis diebus & vicibus* until another Day *continuando*. Upon Not Guilty, found *pro Quer.* and entire Damages given. It was moved in arrest of Judgment, that the Declaration for the Caption and Asportation of the Oysters was ill in the *continuando*, not expressing any certain Quantity, therefore the Damages entire made the Verdict vitious. Judgment *quod Quer. nil cap. per Billam.* Sir T. Jones 109. *Hevell and Reynolds.*

Trespas by Men and Beasts with a *continuando*, and Verdict for the Plaintiff, and Damages *pro Transgressionem prædictam*; it was moved in arrest of Judgment, because Trespas by Men may not be with a *continuando*; yet *per Cur'* it's good after a Verdict; and Damages shall be intended to be given for the Trespas which may be with a *continuando*. *Siderf. p. 379. Pave and Brown.*

Trespas for casting in Logs into the Plaintiff's Close, *continuand. Transgressionem prædictam*; which may not be, it being the Act of a Man; and it's not like Beasts which continue on the Land. *Siderf. 224, 249. Lichford and Elliot. 1 Keb.*

In Trespas for breaking his Close, digging Coals, and taking away 40 Loads of Coals, and laid the Trespas 1 July 14 Car. until No. 15 Car. with a *continuando diversis Diebus & Vicibus*;

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but the Plaintiff could prove no Re-entry, and so could recover no more but for the first Entry, and nothing for the Coals taken away; but that is a distinct Trespass, and a new Action lies. At a Trial before Judge Henden.

Trespass with a *continuando* for 500 Years, it's not Error: he ought to have pleaded the Statute of Limitations. *Siderfin* p. 253.

Continuando transgressionem prædict. quoad asportationem hordei & gran. præd. from such a day to such a day, it's Error; for such a Trespass may not be with a *continuando*: but if it had been *continuand. transgression. prædict.* without enumerating the Trespass, it had been good: yet after a Verdict it shall be Surplusage, and all the Damages shall be given for the Entry residue. *Siderf.* p. 319. *Mich.* 20 *Car.* 1. *Butler and Hodges.* This Case of *Butler and Hodges* is well reported in 1 *Levinz.* 210. the Plaintiff lays the Trespass the first of *April* of the taking ten Loads of Wheat, ten Loads of Barley, ten Loads of Oats, *continuando* the said Trespass from the first Day of *April* to the first day of *June*. It's Error; the Trespass being laid that he took them the first of *April*, and so all in one Day, the *continuando* is ill; for that which is done the first of *April* cannot be done on another Day after: but he ought to have declared for so many Loads taken and carried away at one Day, and so many at another; and *Whichcot* and *Elliot's Case*, 16 *Car.* 2. was cited; but Judgment was affirmed. And it was said, That after in *Whichcot's Case* Judgment was given *pro Quer.* it was agreed that for doing of a single Act, which is to be done all at one time, and the killing of a Horse the *continuando* is ill: but of divers things which may be done at divers times, as here, tho' the Trespass be at first laid to be done the first Day, the *continuando* shall make a distribution of it,

it, that part was done at one Day and part at another within the time, and Judgment was affirmed.

Trespas *quare Clausum fregit*, and depasturing his Grass, and subverting an hundred Piles there fixed, and carrying them away. Transgression *predict. continuando* to the exhibiting the Bill. Verdict *pro Quer.* and Damages entire. Moved in arrest that the *continuando* was impossible as it is alledged. *Ergo* entire Damages being given, the Verdict is vitious in the whole. But *per Cur.* the Verdict aids it, and that after Verdict the *continuando* shall be applied only to the depasturing and spoiling his Grass. So was the Case of *Lechford and Elliot. Vide supra.*

Trespas for spoiling Corn in the Blade may be with a *continuando diversis diebus & temporibus* for two Years, though there cannot be a continuance of such a Trespas for so long together. 2 *Rolls Abr.* 549. *King's Case* cited in *Raym.* 396. *Nappier's Case.*

Trespas for carrying five hundred Loads of Barly may be with a *continuando. ibid. vid. 2 Keb.* 173, 203, 215.

Continuando is properly in Trespas *quare Clausum fregit* or *Domum fregit*, and not of an Horse taken or Trees cut.

Trespas with a *continuando* for five hundred Years, and it is *contra pacem Domini Regis nunc*, where the Trespas was in the Reigns of several Kings. Yet it's not Error. *Siderf. p. 253.*

Trespas with a *continuando*, a President. *Plowd. Com. 21. a. 38. b.*

Narratio pur Close debruse & pur depasturant avec avers cum continuando usque diem exhibitionis Billæ. 1 Sanders 24.

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Declaration for Close broken, Grass spoiled *Pedibus ambulando*, and for depasturing with his Beasts, with a *continuando* until the Bill exhibited. *The Form, Sanders 1. p. 24.*

Continuando does not lie of Gorze.

A Trespas *de blees in bladis* may be with a *continuando*.

A Trespas of Goods-carried away may be with a *continuando*.

A Trespas *quare equum cepit* may not be with a *continuando*. 2 *Rolls Abr.* 549. a.

Trans. with a *continuando*, the Plaintiff could not prove the first Trespas, though the *diversis vicibus* after he could prove, and was Nonsuit at a Trial before Judge Thorp.

Trespas is laid 1 *Octob. continuando* the said Trespas *a prædicto primo Septembris* to a Year after. This being but a Mistake in the Aggravation of Damages, and the main Trespas being tried, the Court conceived it well enough, and the Damages shall be intended for the principal Entry, the other being repugnant and impossible. 2 *Keb.* 407. *Pain and Brown.*

Trespas is laid the 26th of *May, continuando* to the 30th. Defendant justifies the 26 *May* for way to his Common, and saith nothing to the *continuando*. *Per Cur.* it's well enough, because the principal Trespas being answered, the *Continuando* is but for Aggravation of Damages. 2 *Keb.* 167. *Catesby and Daniel.*

Upon the Evidence it is not needful to prove a Re-enty if the Action be brought against the first Trespasor, as it must be where it is against a Stranger as Feoffee of the first Trespasor.

Trespas of throwing down Hedges with a *continuando* is good: though of breaking a House or Close, or cutting Trees there is no such continuance.

ance, importing only one single Act. 3 Keb. p. 250. *Rose and King*.

The Plaintiff declares with a *continuando usque diem impetrationis brevis*, (*viz.*) the 18th Day of *March*, where the *Teste* of the Writ was the second Day of *January*. The Defendant pleads to Issue, and found for the Plaintiff, this Misprision of the *Teste* could not be amended. 1 *Leon.* p. 81.

It appeared not by the *continuando* how long the Trespas continued, *Windham* it is *diversis diebus & vicibus*, and the continuance is but in Aggravation of the Trespas, and the Action it self is for the first Trespas, which is the Original. *Stiles* 171. *Ireland* and *Michelbourne*.

C A P. VII.

Having set down several general Notes about Declarations in Trespafs, I shall now come to the particular sorts of Trespafses; but before I do that, I shall shew what Persons may have Trespafs and for what, and against what Persons this Action may be brought and for what, and hint at the Pleading thereon, and subjoin a Reference to Presidents of Writs or particular Declarations applicable thereunto.

What Persons shall have Trespafs, and for what.

Baron, Baron and Feme.

A Man may bring an Action for the Battery of his Wife, and the Wife not be joined with him. 2 Rolls Abr. 556. 15, 16.

Battery against Baron and Feme, the Defendant appeared in *propria Persona*, and the Wife was in *custodia*, and so the Plaintiff declares against them. It's not good; for the Husband ought to put in Bail for his Wife. *Stiles Rep.* 216. *Maibdit.*

Trespafs of Assault and Battery, for that the Defendant did beat, assault and wound the Plaintiff, *nec non* for that he assaulted and beat the Wife of the Plaintiff, *per quod Consortium Uxoris suae* pur three days *amisit*. *Per Cur.* the Action is well brought by the Husband; for it is not brought in respect of the Harm done to the Wife, but it is brought for the particular Loss of the Husband's
Cro.

Cro. Jac. 501. *Guy and Livesey*, 2 *Rolls Rep.* 51. *mesme case.*

C. brought an Action for the Battery of his Wife, *per quod negotia sua infecta remanserunt*; and had Judgment to recover. *Chomley's Case* cited in *Guy and Livesey's Case*.

Baron and Feme join in Trespas for the Battery of the Wife, and so for the Imprisonment of the Wife: the Baron may say *ad dampnum ipsius* or *ad dampnum ipsorum* *Reg.* 185. b. *Lib. Intr.* 610, 688. *Hetly p.* 2. *Siderfin p.* 387. *Horton's Case.* *Vide Stiles Rep. p.* 129. *Stradling versus Bowman Tel.* 89. *Higgins's Case.*

If Baron and Feme join for the Battery of both, this shall abate for the Battery of the Husband. 9 *Ed.* 4. 54. *Survey del Ley*, 331. 2 *Rolls Rep* 51.

If Baron and Feme are beaten, they shall have several Actions.

Trespas for beating and taking away of Goods, the Writ shall say *de bonis viri*, for the Wife may not have Property *durante coopertura.* *Reg. Orig.* 105. b.

Baron and Feme brought Trespas for the Battery of the Wife and taking away the Goods of the Husband only, *ad dampnum ipsorum*, and it was held to be ill. *Hetly p.* 2. *Thomas's Case.*

Baron and Feme ought not to join in Trespas for the Battery of the Wife and tearing the Coat of the Wife; and it was *ad dampnum ipsorum*, which ought not to be. In Actions for Wrongs which shall survive to the Wife, Baron and Feme shall join, and in no other Case. *Siderfin p.* 224. *Staunton and Hobart*, p. 387. *Vide 1 Keb.* 273. 781.

Baron and Feme may be charged with a Joint-Battery or Imprisonment, but not in Trover and Con-

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Conversion. *Crok. Jac. p. 661. Berry against Nevis.*

Baron and Feme may join in Trespafs *de Clauso fracto* and cutting their Grass. So they may join for the taking away 20 Loads of Hay *inde provenien*. though it be a Chattel severed from the Inheritance and vested in the Husband. *Cro. Eliz. p. 96. Cookson and Castline.*

J. M. and M. Uxor ejus brought Trespafs *quare Clausum fregit, Herbam suam messuit, &c.* Exception was taken, that it was not the Hay of the Wife, nor she was not damnified by it, but her Husband. By *Wray* the Declaration is good enough; for though it be not good for the Hay, yet *Clausum fregit* makes it good. *1 Leon. 105. Wilkes and Persons.*

For Trespafs done to the Wife before or after Marriage, they must join, except the beating the Wife during the Coverture be so great, that he *Consortium suum amisit*, then he may sue alone.

A Feme covert (in the Absence of her Husband, he being beyond Sea) may bring Action of Trespafs for Assault and Battery made on her, in her own and her Husband's Name; but not *e contra*. *1 Balstr. 140. Anonymus.*

Rose E. brought Transf. against *P.* for putting in Beasts into her Land, &c. *1 May, continuando usque January*, and on Not Guilty pleaded, had Judgment. *P.* alledgeth for Error; Error in fact, that the said *Rose* was Covert Baron the said first day of *May* and for a Week after. *Per Cur.* it's no Error; for the Wife shall have Trespafs for a Trespafs committed on the Land of the Wife during the Coverture, and Damages shall go with the Action. *2 Rolls Rep. 264. Peeter against Rose Edmunds. Palmer Rep. 313.*

In Trespals *quare Clausum fregit* brought by Baron and Feme, they may join ; for *per Curiam*, it shall be intended they are Jointenants. 1 *Bulstr.*

110. *Maynard & Uxor* against *Tower*.

Lord Coke said when he was Reporter in C. B. the Husband was to be amerced, and for the Battery of the Wife, Judgment to be *quod capiantur*. 2 *Bulstr.* 151.

If Cause of Action arise before Coverture, though but Trespals where only Damages are recoverable, they must join. 1 *Keb.* 440. *Hardy* and *Robinson*.

B. procured J. S. to sue him and his Wife in an Action of Goods taken away by her, and had Judgment by Confession of the Husband, which the Court set aside as illegal : but if it had been tried in Issue, J. S. might have taken both. 1 *Keb.* 637. *Bradely* and his Wife.

Trespals of Assault, Battery and Imprisonment of the Wife untill the Husband paid eleven Pounds, *ad dampnum ipsorum* ; it's good. 2 *Keb.* 230. *Browne* and *Tripe*.

Baron and Feme Brought Action of Battery for the beating of them, *ad dampnum ipsorum*, it's ill. For the Battery of him she cannot join, but for the other they may. This was on a general Verdict, had the jury found the Battery or Damages joint or several it might be otherwise. 2 *Keb.* 269. *Jones* and *Ayllof*.

Baron and Feme brought Action for the Battery of the Wife, *ad dampnum ipsorum*, and good : for the Action and Damages shall survive ; and in all Cases of Survivor the Action may be laid *ad dampnum ipsorum* : but in Actions for beating the Husband and Wife they cannot join nor conclude so. 2 *Keb.* 434. *Hori's Case*.

Trespals

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Trespafs by Baron and Feme for beating the Wife, and taking away from her an Apron and a Pinner, and the Verdict being general, *per. Cur.* the Judgment was stayed, for that the Feme cannot joyn as to the Goods, unless there had been several Pleas or several Damages. 2 *Keb.* 813. *Dunwell* and *Marshall*.

Ad Actionem de captu Uxor' Quer' &c. Bar quod diversæ lites & controversiæ ortæ fuer' inter Quer' & S. Uxor. ejus quæ prosecut' fuit quer' in Curia Christianitatis, quodq; ipse Def. ad requisitionem dictæ S. ipsam per manum suam cepit & salvo & honeste conduxit illam ad eandem Curiam & retrorsum ad hospitium suum quousque secta illa determinata fuit quæ sunt ead. raptus & abductio, &c. 2 *Browne* 282.

Trespafs *versus* Baron and Feme *de Clauso fracto* of the Baron's, and for the Battery of the Wife, *ad dampnum ipsorum*. They cannot join in Trespafs *de Clauso fracto* of the Baron's, but for the Battery of the Feme they may, therefore the Declaration is ill. *Quære* if Verdict may make it good. *Cro. Jac. p. 655. Buckley* and *Hale. Vide* this Case in *Palm.* 338: two Judges against two, as to the *dampnum ipsorum*.

Assault and Battery against Baron and Feme for Battery by the Feme, they are found Guilty; the *Quod Capiatur* shall be against the Baron only. *Cro. Car. 513. Anonymus*.

Assault and Battery brought by the Plaintiff and his Wife against the Defendant and his Wife. The Jury found *quoad* the beating of the Plaintiff's Wife only, that the Defendants are Guilty, and *quoad resid.* they find for the Defendants. Moved, That the Declaration was not good, because the Husband joins with his Wife: for as to the Battery made upon him he ought to have brought his Action alone. But *per Cur.* the Declaration is cured

The Law of Trespass.

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cured by the Verdict. 2 Mod. 66. *Hocket & Ux^r versus Stiddolf & Ux^r*.

Trespass by Baron and Feme for breaking the Close of the Baron *ad dampnum eorum*. The Declaration is not good, nor aided by any Statute. Cro. Jac. 437. *Marshall and Doyle*.

In Trespass by Baron and Feme of a Close broken, & *bona sua capt.* and Accounts of a Trespass made to the Wife *dum sola fuit*, this shall abate the Writ. *Dyer* 84. pl. 80.

The Husband only may have Trespass for Deceit concerning the Land of the Wife. 8 H. 5. 9. pl. 13.

So the Husband alone shall have Trespass upon the Stat. 5 R. 2. c. 7. because he only shall have Damages. 38 H. 6. pl. 9. 4 Ed. 4. 13.

Baron and Feme Executrix to B. join in Trespass for taking of the Goods *durante coopertura*. 21 Ed. 4. 5. per Littleton.

Transgr. brought by the Husband for beating his Wife, whereby she died, lies not, because it is Felony. *Stiles* p. 347. *Higgins's Case* cited there.

Trespass made to a Feme Sole, who after takes Husband, they shall have Trespass in their Names, and it shall be *Bona & Catalla* or *Clausum* of the Wife. *Vent. Entr.* 210. *Dyer* 307. b.

Pro Viro & uxore de Warrena. Uxoris fugat. & leporibus & cuniculis capt. 43 Ed. 3. 13. Ra. Entr. 650.

Trespass for that the Defendant made an Assault upon *Elizabeth* the Plaintiff's Wife, & *illam verberavit & male tractavit, nec non* the said *Elizabeth simul cum* one Gown, &c. of the Goods of the Plaintiff, *simul cum* the said *Elizabeth apud D. tunc & ibid. cepit & abduxit & abcarriavit, nec non eandem Elizabetham per quinque annos ab eodem le Plaintiff detinuit & custodivit per quod*
le

le Plaintiff solamen & consortium, nec non consilium & auxilium in rebus domesticis quæ idem le Plaintiff habere debuisset & potuisset cum Uxore sua per tot. tempus prædict. perdidit & amisit & alia Enormia; &c. found for the Plaintiff, and Damages 300 l. Error brought,

1. Because the Action was brought by the Baron only for the Battery of his Wife, which ought not to be, and then the Damages being entirely given, the Judgment is erroneous. But *per Cur.* the Action here is not brought for the Battery of the Wife, but for the Loss and Damage of the Husband for want of her Company and Aid; and all is concluded with the *per quod, &c.* which extends to all that was before.

2. Because it is *cepit & abduxit*, where it should be *rapuit*, according to the Register: but it's good either way. *Cro. Jac. p. 538. Hyde and Scyffor. Westm. 2. cap. 34. Lib. Intr. 662.* but in the Count the Plaintiff ought to shew the Goods in certain. *2. Rolls Abr. 551.*

The Husband shall have this Action although his Wife die: for in this Action he shall not recover his Wife but Damages. *2 Inst. p. 434.* He cannot have an Action for taking her as his Servant, because the Law gives him an Action in another form. *Westm. 1. c. 13. Westm. 2. c. 34.* In the Original Writ *de Uxore abducta cum bonis Viri*, it is concluded *contra formam Statuti in hujusmodi Casu provisi, i. e. Westm. 1.* If the Writ be brought at Common Law, omitting these Words, *contra formam Statuti*, then it is, *si A. fecerit, &c. tunc pone, &c.* but if on the Stat. it is *tunc Attachies. Dyer 256. pl. 10. Stiles p. 44.*

Baron and Feme brought an Action of Trespafs *quare Clausum fregit*, and for Battery of the Wife. Q. if the Writ shall abate: for as to the *Clausum fregit*

fregit, the Wife had no Cause of Action; or whether the Plaintiff shall have Judgment for part. *Hutton p. 59. Anonymus.*

Declaration by Baron and Feme for Assault and Battery made to the Feme, and that the Defendant *alia Enormia eis intulit*, which ought not to be; for it was a personal Wrong to the Feme. *Cro. Jac. 664. contra. Stiles p. 236. Wats's Case, Trespafs against Baron and Feme.*

If the Wife beat another, the Husband ought to be named in the Writ. *Reg. Orig. 105. b. Lib. Itat. 612. A. § 11.*

Baron and Feme may be charged with a Joint-Battery or Imprisonment; but not for Goods in Trover converted to their Use. *Cro. Jac. 661. Berry's Case.*

Baron and Feme brought Assault and Battery against Baron and Feme for Battery of the Wife of the Plaintiff. It was found, the Husband Not Guilty, and the Wife Guilty; and Judgment was *quod capiantur*, and good. *Cro. Jac. 203. Hales Case, 22 Ass. 57. contra.*

In Battery against Baron and Feme, the Husband justifies in aid of the Wife; the Wife pleads *son Assault demesne*; both Issues were found for the Plaintiff, and Damages entirely given. *Per Cur.* the Trial was ill; for the Wife by her self cannot plead; and the Damages being entirely assessed, all was ill: a Repleader awarded. *Cro. Jac. p. 239. Watson against Thorpe and his Wife. Vid. 1 Brownl. 188. Hernpleds 393.*

Presidents of Assault and Battery against a Man and his Wife, the Man pleads *non culp.* and the Wife pleads *son assault demesne.*

Versus Virem & Uxorem de insultu per Uxorem. *Hern. pled. 393.*

The Law of Trespas.

The Husband shall never be charged by the Act or Default of his Wife, but when he is made a Party to the Action, and Judgment given against him and his Wife; as for the Debt of the Wife or Trespas done by her, &c. the Action of Debt or Trespas shall be brought against Baron and Feme, and the Husband shall plead, &c. and shall be party to the Judgment. 11 Rep. 61. b. in Dr. Foster's Case.

Trespas *de muliere abducta cum bonis*, &c. lies against Baron and Feme. Survey del Ley, 342.

Trespas is made by a Feme Sole, who after marries; her Husband shall be named with her for Conformity, and he shall satisfy the Damages and the Declaration. Vide Co. Entr. 67. b. Hobart p. 96.

Trespas against Baron and Feme *dum sola fuit*, both are found guilty, it shall be *capiantur pro fine*. Hetley p. 53. in Johnson's Case.

In Trespas against Baron and Feme of Trespas *dum sola*, Issue, *quod ipsi sunt inde culpab.* is void, but the Judgment good. 3 Keb. 646. It should have been, *quod ipsa non est culpab.* 2 Cro. 6. 3 Cro. 883. 2 Rolls 62.

Baron and Feme are sued for the Tort of the Feme. Cro. Jac. p. 5. Cox and Cropwell.

Trespas against Baron and Feme, the Wife is taken by *Capias*, but not the Husband, the Declaration shall be put in against Baron and Feme, and the Wife appearing shall be committed to Prison. Mich. 15 Jac. B. R. Ashwell versus Opshard.

The Count was against Baron and Feme of Trespas done *cum averijs suis*, and good, and doth not say whether they were their Beasts after or before Coverture. 1 Keb. 944. Collingwood and Bishop.

If a Servant be beaten the Master shall have By Master. Trespafs, and so shall the Servant too, though he be a Servant at will. 1 *Anderson* 13. *Armstede's* Case, 9 Rep. 113. 10 Rep. 130.

If a Servant be beaten, the Master shall have an Action, but the Battery ought to be so great *per quod Servitium suum amisit*; but for every little Battery the Servant shall have an Action. 9 Rep. 113. a. the Count ought to say, *per quod Servitium suum amisit. Lib. Entr. 613.* b. sect. 19. the form of the Count and Bar, *quod non retentis fuit cum querent. Ra. Entr. 647.*

As for the Count, the Plaintiff need not count upon the Reteyner, or shew how Servant or Apprentice. *Stile* 94. *More and Stone.* 2 *Bulstr.* 198.

Trespafs *quare vi & armis cepit & abduxit*. such an one his Servant; the Action doth not lie if the Defendant privately retained him; and had no Notice to whom he appertained. *Aliter* if the Retainer were at Sessions. *Winch. p. 51.*

If a Man beat my Servant, and after he dies, yet I shall have Action of Trespafs. *Aliter* if it were my Wife. 2 *Rolls Abr.* 568. o. 2, 3. *Telv.* p. 89. 90. *contra vid.*

Trespafs for taking away his Apprentice. *Nat. bre.* 91. l. 8 *H. 6.* 18. 21 *H. 6.* 31.

A Servant which is commanded to carry Goods to such a Place, shall have an Action of Trespafs. 1 *H. 6.* 4. 19 *H. 6.* 34. *Co.* 13 Rep. *Heydon and Smith.*

In Trespafs for beating his Servant, it's not necessary he be an hired Servant *secund.* 5 *Eliz.* if he be hired for some time, though less than an Year, it's sufficient. At a Tryal before Judge *Thorp.*

For threatening my Servant *per quod, &c. Ra. Entr.* 661, 662.

The Law of Trespafs.

De Apprentitio abducto. Reg. 109. 21 H. 6. 31. 22 H. 6. 30.

Assault and Battery of my Servant *per quod, &c.* Reg. Orig. 102. N. B. 91. 1.

Transf. de Serviente verberato. Repl. Non fuit retent. cum quer. Ra. Entr. 674.

Battery, Maheym and Imprisonment *per quod, &c.* Trespafs lies. Ra. Entr. 342.

For enticing my Servant to depart Trespafs lies not, but Action on the Case. 2 Rolls Abr. 566. 11, 12.

If a Servant depart out of my Service, no Action of Trespafs lies against him. 2 Rolls Abr. 556. 13.

Trespafs *per quod Servitium suum amisit*; if the Battery be justified, he need not answer to the loss of the Service, for that is but a Consequent of the Battery.

If one be erecting a Nuisance against me, and I thrust away his Servants, &c. I may plead *non culp.* for this cannot be loss of Service. 1 Rolls Rep. p. 393. Norris and Baker.

By the King.

The King shall have Trespafs *quare Clausum fregit*, but in this Case the Party may not make Fine. Nat. B. 9. Regist. 99. a. 10 H. 4. 3.

But for Trespafs in the Lands of the King it's usual to have an Information in the Exchequer, &c. the Judgment in such Case *vide* N. B. 90. 1. Plow. Com. 561.

The King, who hath Profits of Land by Outlawry, shall have Trespafs, or take the Goods Damage Feasant. Co. 13 Rep. p. 69.

Transf. pro Rege de Chacea fugat. & Damis capt. Ra. Entr. 650.

The Grantee or Patentee of the King, *de Herbagio Forestæ*, shall have an Action against any who

who consumes or destroys the Grass, but not Trees. *Dier* 285: pl. 40.

The Queen shall have Trespass without the King.

If nine parts of the Corn are severed for Tythes, By a Parson. the Parson shall have Trespass against him that takes them before Seizure: but not of a Mortuary before Seizure. *Plowd. Comment.* 281. a. in *Fox* and *Greisbrook*.

Parson or Vicar shall have Trespass for the Walls or Glass of the Church, or for Grass or Trees in the Church-Yard, or in the Glebe-Land. 11 H. 4. 12. 8 H. 6. 9. 11 H. 6. 4.

Parson imparsoned shall have Trespass against any who is admitted and inducted into his Church, if he intermeddle with the Glebe or Tythes. *Plowd. Com. fo.* 500. b. 38 H. 6. 24. 39 H. 6. 21, 27.

The Parson of a Church shall have Trespass *pro Piscaria* Reg. 103.

De averijs districtis in Feodo Ecclesiæ. Reg. 100.

De via impedita ad decimas asportandas. Reg. 105.

Church-Wardens shall have Trespass for the Goods of the Church taken away in their time or the Time of their Predecessors, *ad Damnum Parochianorum*. It's a good Plea that they are not Church-Wardens. *Survey de Ley*, 335. N. B. 91. k. *Cro. Eliz.* p. 179. *Hadman* and *Ringwood*. By Church-Wardens.

Church-Wardens may bring Trespass for the taking away of a Bell. *Cro. Eliz.* 145, 179. *Hadman* and *Ringwood*. And it lies by the Successor Church-Warden. *p. ibid.*

The Law of Trespas.

Church Wardens brought Trespas *de Charta Annuitatis in custodia sua lacerat. & Sigill. fract.* Ra. Entr. 7. 619.

Pro Guardianis Ecclesie de bonis capt. Dig. 196.

For a Wrong done in the Church-Yard the Parson shall have the Action.

By Mayor and
Commonalty.

Mayor and Commonalty shall have Trespas. *Vide le Count in Hern.* 809.

By Dean and
Chapter.

Dean and Chapter brought Trespas for entring into the Close of the Dean, it was held not good; for this Action being brought for the Possessions of the Dean only, the Chapter was not to join. *Cro. Eliz. Welley and Robinson.*

By Bishop.

Trespas *per Episcopum de Arboribus succis. tempore vacationis.* Reg. 101, 125.

By Ordinary.

The Ordinary shall have Trespas for Goods of the Intestate taken out of his Possession. *N. B.* 91, *M.*

By Heir.

The Heir shall have Trespas for taking of a Deed concerning Land to him descended. *1 Ed.* 3. 18. *Pl.* 11. 43 *Ed.* 3. 24. *Pl.* 3. But not against an Executor for taking a Box with Deeds.

It lies against an Executor for taking Fish out of a Pond.

The Heir shall have an Action of Trespas against an Executor for taking away a Furnace or Pales fixt. *21 H.* 7. 26. *Pl.* 4.

So for taking Fishes out of a Pond. So for Deer or Pigeons. *Survey de Ley*, 336.

The Heir shall not have Action of Trespas before he enter, in case of Lands descended to him. *Vide prius.*

Executor

Executor shall have Trespafs per 4 Ed. 3. cap. By Executor.
6. and 31 Ed. 3. gives the same Remedy to an
Adminiftrator. by the Equity of the Stat. 4 Ed. 3.
c. 6. 14 H. 7. 13. 24 H. 7. 101. b. Pl. 2.

Executor shall have Trespafs for Goods and
Beasts taken out of the Poffeffion of the Testator.
Vide Le Count. Ra. Entr. 640. A. fect. 2. N. B.
87 E. Reg. 98. a. 92. but not *de Clauso fracto*,
nor *de Arboribus succifis tempore Testatoris*; he
shall fay *bona Testatoris*. 3 Bulstr. 111.

At this day Executor of Executor shall have fuch
Action. Reg. 98. A. *Plowd. Com. 290. a.* though
formerly the contrary was held. As fee there, and
2 *Rolls Abr. 568. o. 1.* If Trespafs be done to
the Goods of the Testator in the Hands of the
Executor, and the Executor after dies, his Execu-
tor shall not have Trespafs.

If the Executor fue for Goods taken out of the
Poffeffion of the Testator, this Writ may not fay
ad grave dampnum, neque in retardationem, &c.
Fitzherb. N. B. 87. Reg. 98.

Executor shall have Action of Trespafs before
Probate, if any take the Goods before the Execu-
tor feize them; for he had Property in them by
being made Executor. *Plowd. 281. a. 2 Bulstr.*
268. *Fisher verſus Young.*

Executor shall have Trespafs *de bonis Testatoris*
in cuſtod. ſua exiſten. as ut *de billa obligatoria, de*
bove in teſtati ſub cuſtod. adminiſtratoris capt. Ra.
Entr. 649. and ſhall fay, *bona ſua.* 3 Bulstr. 111.
Reg. Orig. 94. a. 2 H. 7. 15. 6 Ed. 4. 1. 14 H.
4. 29. Her. 504. 3 Bulstr. 472.

A. adminiſters *de bonis B. C.* proves a Will by
which he was made Executor. C. may have Tref-
pafs againſt A. for the Goods, notwithstanding
Adminiſtration was not repealed. *Mich. 12 Jac.*
B. R. Fisher and Young. 2 Bulstr. 268.

The Law of Trespas.

Executor of the Lessee shall have Trespas against the Lessor who ejects him; and the Writ shall be *summoneas per bonos summs. &c.* but if he eject him and take Goods within the Land, the Writ shall be *pone per vad. & pleg.* Reg. Or. 102, b. 97.

Pro Executore de ingressu post Mortem Testatoris in terris dimiss. testatori per Defend. Reg. 97. 102.

Executor brings Trespas against J. H. for that he took and chased, &c. two Oxen, which were the Testator's *tempore mortis sue*, to the Damage of the Plaintiff, and in *retardatione Testamenti*: It was demurred to, because it should have been mentioned, the Goods were taken *extra custodiam suam*. But *per Cur.* it's well enough. Cro. Jac. p. 113. Adams and Cheverell.

By Administra-
tor.

Administrator shall have Trespas for the Goods of the Intestate taken out of his own Possession, and the Count. *Lib. Intra.* 649. d. f. 1. Reg. Or. 94. a. 22 Ed. 4. 112. Pl. 32.

Administrator shall have Trespas for Goods taken out of the Possession of the Intestate, *per Stat.* 4 Ed. 3. c. 7. and the Count, *Lib. Intra.* 640. a. f. 1. but not the Ordinary. N. B. 92. a. 14 H. 7. 13. Cro. Eliz. 384. Smith's Case.

Administrator shall have Trespas or Trover before Administration committed to him (but not against him who justifies under the Ordinary.) 18 H. 6. 22. 36 H. 6. 8. a. Reg. Orig. 102. B. Stiles Rep. p. 341. Long's Case. For Administration doth relate to the time of the Death of the Intestate, and not to the time of granting of it.

Lessor

Lessor shall have Action of Trespafs against By Lessor. Lessee at will for voluntary Waste before Entry; for this amounts in Law to a Determination of his Will. *Co. Lit.* 57. a.

If Tenant at Will grants over his Estate to another, and the Grantee entereth, he is a Disseisor, and the Lessor may have an Action of Trespafs *vi & armis* against the Grantee; for though the Grant was void, yet it amounts to a Determination of his Will. *Co. Lit.* 57. a.

Tenant for Years holds over his Term, and so becomes Tenant at Sufferance; Lessor shall not have Action of Trespafs before Entry. *Co. Lit.* 57. b.

Lessor excepts the Trees, he shall have Trespafs *quare Clausum fregit*. 14 H. 8. 1. 8 Rep. 63. *Swayne's Case*.

Counts *de tenentibus minat*. *Ra. Entr.* 662. *vid. supra*, *Titulo Servants*.

Estranger cuts down the Trees, or doth other Waste; By Lessee. Lessee shall have Action of Trespafs, and recover treble Damages. But if Lessor die before his Action of Waste sued, single Damages. *Rolls* 2 Abr. 551. 5, 6. *Doct. and Stud.* 34. a.

Tenant for Years is ousted, and the Years expire; he shall have Trespafs before Entry, and recover the mean Profits. 38 H. 6. 28. b. 13 Rep. Co. p. 69. *Vide supra*.

Lessee shall have Trespafs *quare Clausum fregit*, for the Entry of the Lessor, and for cutting Trees, for the special Loss. 19 H. 6. 45. Pl. 94. 12 E. 4. 8. Pl. 20. 3. 6 H. 5. 5. *Dier* p. 90.

If Lessor eject Lessee for Years, an Action of Trespafs lies against him by the Lessee. *Sur. de Ley*, 346. *Vid. plus apres*.

The Law of Trespafs.

A Man Letts Land except the Trees, and grants Liberty to the Lessee to lop them, and after the Lessor cuts them down: the Lessee shall have an Action on the Case, and not Trespafs. *Pal.* 211, 212.

By Tenant at Will and Suffe-
rance.

Tenant at Will shall have Action of Trespafs against a Stranger. *Co.* 13. *Rep.* 69.

Tenant at Suffe-
rance shall have an Action of Trespafs in respect of his Possession. 2 *Rolls Abr.* 551. N. 1, 2, 3. *Vid. supra.*

By him which hath Profit ap-
prender.

He that is a Grantee *proficui* of such a Meadow *post falcation. inde (videlt.)* that is, such Grass that is after mowing till Lady-day after, shall not have Trespafs *quare Clausum fregit*; but for spoiling the Grass he may. 3 *Leon.* 213. *Hitchcock's Case.*

Trespafs doth not lie for him who had Profit *ap-
prender* out of the Land of another; but Action of the Case lies against him that hath the Frank-Tenement in Possession, as in the Case of *Herbage, Pawnage, &c.* 2 *Anderson* p. 7.

Grantee of Herbage shall not have Trespafs *quare Clausum fregit*, (*quare de hoc, vide post.*) but for spoiling the Grass he shall have Trespafs. But *per Co.* on *Lit. fo.* 4. b. the Grantor of *Herbagium terræ* hath a particular Right in the Land, and he shall have Action *quare Clausum fregit*. So shall the Grantee of the Ear-grass. 2 *Leon.* p. 213. *Harvy and Hitchcock, Dier* 285.

The King's Patentee *de Herbagio Forestæ*, shall have Trespafs for Grass, and shall say, *quare Clausum fregit*.

A. Lett's Land to *B.* to sow, and *A.* is to have the Moiety of the Corn; *B.* shall not have Action of Trespafs againg *A.* for wasting the Corn. 329 *Hill.* 30 *Eliz.* *Hare* versus *Oakley.*

A.

A. seized in Fee of a Close, grants the Pasture of the Close to B. for Years; B. shall have Trespas *quare Clausum fregit*. *Rolls 2 Abr. 549 H. 2.*

He which had but one Crop and the first Vesture of a Meadow, or second Crop every third or second Year, shall have Trespas *vi & armis quare Clausum fregit*. So he which had *Herbajum Parci*. *More No. 453.*

Copy-holder paying his Customs and Services, By Copy holder if he be ejected by his Lord, he shall have Action of Trespas against him. *Co. Lit. 60. b. q. 61. a. t. 4 Rep. 22. a.* for though he is *Tenens ad voluntatem Domini*, yet it is *secundum consuetudinem Manerij*.

Copy-holder shall have Trespas against his Lord for cutting Trees or breaking his House. *Co. 12 Rep. 69. 1 Leon. 272. 2 H. 4. 4. 12. 4 Rep. 21. More, Stebbing and Goswell.*

Copy-holder shall have Trespas for breaking his Close and cutting his Trees. *No. Liber Intr. 644. c. 4. Rep. 31. a.*

Copyholder shall have Trespas for entring his Close and burning his Hay. *35 H. 6. 5. Pl. 7.*

Copy-holder shall have Trespas, and this before his Admission by Descent. *2 H. 4. 12. Pl. 49. 4 Rep. 23. b.* and though he surrender, yet before Admittance he that maketh the Surrender continues in Possession, and not the Lord, or *cestuy que use*, and he shall have Trespas against any that enters. *Cro. Eliz. p. 349. Berry and Green.*

A Copy-holder of Underwood without the Soil shall have Trespas *quare Clausum fregit*. *More N. 480.*

By Tenants in
Common.

Tenants in Common ought to join in Trespafs against one who pulls down their Houses, breaks their Close, &c. and if one die, the Action shall survive. *Lit. sect. 315. Cro. Jac. 231. Some's Case.*

Where Damages are to be recovered for a Wrong done to Tenants in Common in a personal Action, and one of them die, the Survivor of them shall have the Action; for albeit the Property be several between them, yet the personal Action is joint. *Co. Lit. 198. Vid. Lach. p. 152. Harman and Whicblowe.*

One Tenant in Common brings Trespafs for entring into the Land, the Defendant pleads Not Guilty. The Jury found him Guilty, and Judgment for the Plaintiff. It had been a good Plea in Abatement to say, That the Plaintiff was Tenant in Common with a Stranger; yet he having not pleaded it, he hath lost the Advantage thereof; and the Jury finding that he was Tenant in Common is not material. *Cro. Eliz. p. 554. Deering's Case.*

Tenant in Common shall not join in Trespafs for a Battery. *Reg. Orig. 105. b.*

Tenants in Common for taking away of Cygnets shall join. *7 Rep. 17. a.*

One Tenant in Common shall not have Trespafs *de bonis asportatis* against his Companion. *Lib. Intr. 653. B.* Nor of his taking the Profits of the Land. Nor for a several Fishing, *1 Keb. 18.*

If two Tenants in Common be of a Dove-house, and the one destroys the old Doves, whereby the Flight is wholly lost, the other Tenant in Common shall have an Action of Trespafs, *quare vi & armis columbare del Plaintiff fregit & ducent. columbas pretii 20 s. interfecit per quod volatum columbaris sui totaliter amisit*: for the whole Flight

The Law of Trespas.

77.

Flight is destroyed, and therefore he cannot in Bar plead Tenancy in Common.

So if two Tenants in Common be of a Park, and one destroys all the Deer, Trespas lies.

So if one Tenant in Common take and carry away the Mere-Stones.

If two Tenants in Common be of a Folding, and the one of them disturb the other, he shall have Trespas *quare vi & armis*.

Two Tenants in Common of an House, and one of them nailed up the Doors, and made up a Wall against the House to prevent the other's getting into the House, this was resolved no Disseisin, *Allen p. 8. Water's Case.*

If two join in Trespas for taking of Goods whereof they were jointly possessed, one in an Action may not declare of the taking of the Goods from him only; and if one dies, *pendent l^a Action*, all shall abate; *Hetly p. 2. Thomas's Case. Hutton.* though the Trespas shall be punished by the Survivor. *Crok. Jac. p. 19. Sir Oliver Leigh's Case.*

Jointenants.

In Trespas the Defendant pleads Not Guilty? Jury find the Plaintiff was seized of the Land with others as Jointenants. Judgment for the Plaintiff. Yet it had been a good Plea in Abatement had the Defendant pleaded it. *Cro. Eliz. p. 554. Deering and Moor.*

Committee of a Lunatick shall not have an Action of Trespas, but the Lunatick himself. *Hutton 16. Drury and Fitch.*

Lunatick.

Disseisee shall have Trespas for the mean Profit after Re-Entry; if a Disseisor cuts Grass, Trees, Emblements, and Disseisee re-enter, he shall have Trespas *vi & armis* against the Disseisor, but not against

Disseisee.

The Law of Trespafs.

against Feoffee, &c. of the Disseisor; but Dissee shall recover all the Damages against the Disseisor himself. *Dier* 134. *Pl.* 19. *II Rep. fo.* 51. a. b. *Liford's Case.* *Hetly* 66. *Symond's Case.* *Hobart* p. 98. in *Moor's Case.* *Lit. sect.* 430. So I shall not have an Action against the second Disseisor. *Mes 2 Rolls Abr.* 554. *T.* 5, 6, 7, 8. *contra.*

Upon any Continuance in Possession after continual claim by the Disseisor, Dissee shall have Trespafs *quare Clausum fregit.* *Lit. sect.* 430. *Co. L.* 257. *Vid. plus supra.*

Gaoler.

Gaoler shall have Action of Trespafs against one who takes a Prisoner from him. It's a good Plea that he is not a Gaoler. 4 *Ed.* 4. 6. *Pl.* 7. *fo.* 44. *Pl. ult.*

Master of an Hospital.

Master of an Hospital shall have Trespafs for a thing done in the time of his Predecessor. *N. B.* 89. b. *Reg. Or.* 196. B.

Attorney.

Trespafs by an Attorney by Attachment of Privilege. *Ra. Entr.* 610, 619. *Co. Entr.* 644. *Winch. Entr.* 1100.

Trespafs *versus Attorney per Bill.* *Ra. Entr.* 610.

Baylee.

Baylee, or he which had a special Property shall have a general Action of Trespafs against a Stranger, and recover all in Damages, for that he is chargeable over. *Co.* 13 *Rep.* 69. 14. *H.* 4. 28. b. 21. *H.* 7. 14. b.

If Baylee of Goods bring Trespafs, and the Baylor brings another Action of Trespafs, he which first recovers shall oust the other of his Action. 5 *H.* 4. 2. and it shall be a good Bar to the other.

He

The Law of Trespafs.

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He which hath a special Property in the Goods for a time certain, shall have a general Action of Trespafs against him who had the general Property, and upon Evidence Damages shall be mitigated. 11 H. 4. 23.

He which had Cattle for a Year to compost his Lands, may have a general Action of Trespafs against a Stranger if he take them within the Year, and against the Lessor himself, and against his Alienee. 2 Rolls Abr. 551. 2, 3, 4. and 569. 7.

The Agifter of Goods may have Trespafs for the Agifter. taking of them. 48 E. 3. 20. b.

Grantee or Patentee of the King *de Herbagio Forestæ* shall have Trespafs against any who consumes or destroys the Grass, but not the Trees. Dier 285. Pl. 40. *Vide supra in Profit apprehender.*

Where Damages for Goods are recovered against J. S. J. S. shall have Trespafs for the Goods. 1 Keb. 43.

Trespafs for the Battery of the Son doth not lie Father. for the Father, although the Son lose his Marriage by this; but the Son only shall have the Action. Cro. Eliz. p. 55. Gray and Jeffreys. But the Father shall have an Action for taking his Son and Heir, or Daughter and Heir, for that the Marriage appertains unto him. But for the Assaulting and imprisoning his Daughter no Action lies by the Father. Cro. Eliz. fo. 769, 770. Barham and Dennis.

Trespafs *quare vi & armis in Annam Filiam suam & ipsam cepit & imprisonavit*, the Father shall not have the Action: none shall have Remedy for the Imprisonment but the Party to whom it was done: and also the Writ doth not say *cepit & abduxit*. *ibid.*

Intruder

By Intruder.

Intruder on the King's Possession shall have Trespas against a Stranger, but not Ejectment: *Allen p. 10. Johnson and Barret. Q. de hoc*, for then he might be twice punished. *Vide supra contra.*

By Outlaw'd Person.

A Man is Outlawed and pardoned, he shall have Trespas for Trespas done to his Person before Pardon.

By King.

If a Man be Outlawed in an Action personal, and the King hath the Profits of the Land, and Letts the same to another, he shall have an Action *quare clausum fregit*. 3 Leon. p. 213.

By Commoner.

If the Lord leave not sufficient Common, the Tenant shall have Remedy by Assize, Trespas or Prostration. *Cok. Mag. Ch. p. 88. sur Stat. Merton. c. 4.* He may have Action of Trespas against the Lord for digging Pits in the Common. *Siderf. 106. Goe and Corber.*

If a Commoner fill a Trench in the Common which was digged by the Lord, the Lord may have Trespas against him. *Siderf. p. 251. Howard and Spencer.*

A Commoner shall not have Action of Trespas *quare Clausum fregit*. 12 H. 8. 2. *Simon de Harcourt's Case*, 4 H. 7. 3. 15 H. 7. 13.

A Commoner may not have an Action of Trespas for the Beasts of a Stranger doing Damage. *Rolls 1 Abr. 405. A. 5. Bridgman p. 10.*

A Man had Common in the Soil of another, and an Estranger puts in his Cattle, the Commoner shall not have an Action of Trespas; but he may distrain Damage Feasant. Neither shall he have an Action of Trespas *quare Clausum fregit*. *Bridgman p. 10, Bulstr. 2. 88.* A Commoner shall

shall not have an Action of Trespafs of Grafs spoiled. 22 Affize. 48. 2 Rolls Abr. 552. 9.

Cro. Jac. p. 208. Kennick and Pargiter. The Lord is stinted to put in three Horses upon the Common, and because he put in more, the Commoner justifies for Damage Fesant in Trespafs, and good.

The Sheriff takes Goods by *Fieri Facias*, and By Sheriff before Vendition the Defendant takes them, the Sheriff shall recover in Trespafs. *Cro. Eliz. 639. Tyrrell's Case. Mod. Rep. p. 30. Wilbraham and Snowe.* The Sheriff had such a Property in the Goods by the Seizure, that he may well maintain a Trespafs or Trover. 2 Sanders 47. *mesme Case.*

An Action of Trespafs *port per Corporation* By Corporation, *pedibus ambulando* in B. R. *Winch. Entr. p. 1100.*

When an Estray comes within a Manor and By Lord *ferox* walks there, this is a Trespafs, and the Party in Estray. whose Land the Estray is Damage Fesant, may chase him out of the Ground: if an Estray be *ferox* he may be fettered. *Hetly p. 67. Pleydell and Gosmore.*

When the Lord seizeth the Estray, then he hath Commencement of a Property thereby, and he is chargeable against all others for the Trespafs the Estray doth; and if the Estray within the Year stray out of the Manor, the Lord may chase back the Estray; but if it be seized by another Lord, then the first hath lost all Possibility of gaining the Property, and the other Lord ought to proclaim it *de novo*. *Hetly p. 61. Pleydell and Gosmore.*

By Guardian.

Plowd. Com. p. 293. Osborn's Case.

The Plaintiff Infant may sue by Guardian or *Prochein Amy*; but the Defendant shall sue only by Guardian. *Cro. Car. 161. Goodwin's Case.*

Cestuy que Use.

Cestuy que Use at this Day is immediately and actually seized and in Possession of the Land, so as he may have an Assize or Trespas before Entry against any Stranger who enters without Title. *Cro. Eliz. p. 46.*

By Tenant by *Elegit.*

If a Stranger holds out the Tenant by *Elegit*, the Tenant by *Elegit* shall not hold over against the Reversioner, but is put to his Action of Trespas against the Stranger. 2 *Sanders* 72. 4 *Rep.* 82. b. Sir *Andrew Corbet's Case.*

Case by him in Reversion, and Trespas by the Tenant in Possession for the same Trespas.

Case, and declares, That he was seized in Fee of a Close, and the Defendant was possess of another Close next adjoining, between which Closes ran a Rivulet, and that the Defendant had stooped this Rivulet, by which it surrounded and drowned the Close of the Plaintiff; by which *Arbores Maremial' (viz.) &c. putridæ & consumpt' devener'.* The Defendant pleads, That one *S. diu ante prædict. tempus quo, &c. & eodem tempore quo, &c.* was possess of the said Close by Virtue of a Lease made by the Plaintiff's Father, and that he had payed to *S.* 20 *l.* which he had accepted in Satisfaction of the said Trespas. The Plaintiff demurs. *Per Cur.* it's no Plea: For the Plaintiff in respect of the Prejudice, may maintain one Action, and *S.* in respect of the Possession, and of the Shade, Shelter and Fruit of the Trees another for the same Transgression; and the Satisfaction given to the one is no bar to the other. But Trespas during the Term the Plaintiff might not

not have had, being founded only upon the Possession, 3 Levinz. 209. *Bidlesfred and Onslow*.

Trespafs *vi & armis*, Plaintiff declares that the Defendant such a Day and Year did thrust a Woman named *Margaret Hunt*, against his Son *Henry Hunt*, being an Infant under fourteen Years of Age, by means whereof his Thigh Bone was broken; and the Plaintiff expended divers Sums of Money to cure him. 5 l. Damages. *Quær.* If the Action lies for the Father, because it is not laid, *per quod Servitium amisit*, nor that the Son was less capable of procuring a Fortune with a Wife, &c. but the Child himself ought to have brought the Action. So in *Grey and Jeffries Case*. 2 Cro. 55. Trespafs for Battery of the Son lies not for the Father, and *Stiles* 398. but Judgment was given for the Plaintiff in the principal Case, in *Rippon and Norton's Case*. Cro. 63. 849. and 841. *Raym.* 259. *Hunt and Wootton*. Vide to this purpose in an Action on the Case: *Ray.* 302. *Ra. Dutton and Grizil's Case* against *Nevill Pool*.

Against what Persons Trespafs Vi & Armis lies, or not.

Against Baron and Feme, Vide supra.

Against the Sheriff or other Officers.

When a Court hath Jurisdiction of the Cause, and proceeds erroneously, there the Party who sues, or the Officer of the Court who executes the Precept or Process of the Court, no Action of Trespafs lies against them. But when the Court had no Jurisdiction of the Cause, Actions shall be against them without any regard of the Precept or Process. 10 Rep. 76. the Case of the *Marshalsea*.

The Law of Trespafs.

So if the Sheriff extend ancient Demefne Land as well as other, he had a Warrant and is not to difpute what is liable and what not, and is not fubject to an Action of Trespafs. *Hobart p. 48. Cox and Barmfly, 6 Rep. 54. the Earl of Rutland's Cafe.*

On *Fieri Facias* againft J. S. who hath Goods of A. on Sale of thefe Goods Trover or Trespafs will lie againft the Sheriff; and to prevent this, all the Sheriffs of *England* take Security. 1 *Keb. 693. Sanders and Powell.*

The Sheriff takes one not named in the Writ, Trespafs lies againft him; and if the Plaintiff fhew another Perfon to him, Action lies againft both.

A. procures the Sheriff to arreft B. without Writ, and after purchafeth a Writ, and the Sheriff arreft the Perfon being in his Custody, Action of Trespafs lies. *Dier 244. Pl. 61.*

The Sheriff takes B. upon a *Capias*, and doth not return the Writ, B. fhall have Trespafs. 20 *H. 6. 24. a. 21 H. 6. 5. aliter upon a Ca. Sa. or Habere fac. poffeffion. 4 Rep. 67. a.*

If a Sheriff make a good Return in Law, but *faux en fait*, upon an *Habeas Corpus*, this Action lies, 9 *Rep. 99. b. Bagg's Cafe.*

Capias is directed to the Sheriff of *Middlefex*, and he takes him in *London*, an Action of Trespafs lies. 16 *Ed. 4. 6.*

If a Sheriff by Replevin deliver other Goods than were diftrained, Trespafs lies againft him. *Doct. and Stud. 150. Rolls 2 Abr. 552. 6. 14 H. 4. 14. Pl. 32.*

If the Sheriff comes to make Replevin, and breaks the Hedges and Gates, he is a Trespaffor, unlefs the Owner hinder him to make the Replevin. 20 *H. 6. 28. Pl. 19. 2 Rolls Abr. 552. 8.*

In Replevin if the Plaintiff shew the Goods of a Stranger for his own Goods, and the Sheriff take them, Trespafs lies against the Plaintiff. *2 Rolls Abr. 553. 5.*

If another Man's Goods are pledged to me, and the Sheriff take them, I shall have this Action against him. *Bro. Trespafs, 364.*

And if the Sheriff take one Man for another, Trespafs for *Faux Imprisonment* lies against him.

If the Sheriff break the House for Debt or Trespafs, this Action lies. *5 Rep. Semaine's Case.*

If the Sheriff exceed his Authority in the Execution, this Action lies; as breaking Doors, &c. *5 Rep. 93. 196. 1 Brownl. 117. 1 Bulstr. 64.*

If a Bailiff of a Court upon a Summons to him directed attach the Party by the Goods of another Man, an Action of Trespafs lies against him. So if the Sheriff upon Execution take the Goods of a Stranger; but if he attach the Defendant by the Goods of another Man being in his Possession, this is justifiable. *11 H. 4. 91.*

Trespafs lies if he attach the Servant by the Goods of the Master, being in Possession of the Servant, and for the Debt of the Servant. *2 Rolls Abr. 552. o. 2 Doct. and Stud. 149. b. 138. b.*

If a Man hath an Hundred, and *bona & catalla felonum* within the Hundred, and the Sheriff takes the Goods of a Felon within the Hundred, an Action of Trespafs lies against him. *N. B. 91. F.*

If the Sheriff make a Warrant to a Bailiff of a Franchise to take the Goods of a Man in Execution, and he mistakes the Goods, and takes the Goods of another Man, the Bailiffs are Trespaffors, and not the Sheriff. *2 Rolls Abr. 552. 9.*

The Law of Trespas.

If a Man be arrested by the Bailiffs of a Sheriff, and upon this he shews to them a *Superseas* to discharge him, the Bailiffs refuse and detain him, he shall have *Faux Imprisonment* against the Bailiffs, and not against the Sheriff. *Vide infra Tit. Faux Imprisonment.*

A Man is arrested and tenders sufficient Bail, and it is refused, and so he is imprisoned; this doth not make the Arrest and Imprisonment so tortious as to have an Action of Trespas, but he might have an Action on the Case. *Cro. Car. p. 196. Salmon versus Percivall.*

After a Rule of Court to vacate a Judgment, Trespas lies against him that taketh the Goods in Execution. *1 Keb. 453. cited in Felgate's Case.*

If a Keeper detain his Prisoner for undue Fees, after he is discharged by Law, an Action lies. *Bro. Faux Impr. 12 Kel. 36. 89.*

If a Serjeant in London, or Bailiff in the Country takes a Man upon *Capias* in Process at my Suit, and J. S. rescue him out of his Possession, I may have a general Writ of Trespas against him, or an Action on the Case at my Election. *2 Rolls Abr. 556.*

Vide plura de hoc post Titulo Faux Imprisonment.

Act: sur Stat. Marlebridge, c. 15. W. 1. 16. lies, if the Lord distrain *in Via Regia*, or *Communi Strata*; and it shall be *contra pacem*, not *vi & armis*. *2 Inst. 131. Artic. Cler. c. 9. 8 Rep. 60. b.*

Against Seignior.

For a tortious Distress where nothing is arrear, Tenant shall not have an Action against the Lord, of Trespas *vi & armis*, for this is prohibited by the Statute of Marlebridge, *c. 3. non ideo puniatur Dominus*; but if Bailiff or Servant of the Lord takes a Distress where nothing is behind, here Action

Action of Trespafs *vi & armis* lies againſt him; for the Bailiff is not *Dominus*, and therefore it is intended where the Lord himſelf doth diſtrain.

4 Rep. 11. b. *Bevill's Caſe*, *Yelv. p. 148. contra.*
9 Rep. 76. a. Co. 2 *Inf.* 105, 106.

Tenant brought an Action of Trespafs againſt the Lord, and Iſſue is found *pro Quer.* Yet if it appear by the Verdict that the Plaintiff was Tenant and the Lord Defendant, the Writ ſhall abate by the Stat. 10 Ed. 4. 7. *Savil's Rep.*

If the Leſſor put out the Leſſee for Years, or diſſeiſe his Tenant for Life, or do any Act not as *Dominus*, as cut any Wood, or break the Houſe, or feed the Ground of his Tenant, or the like, which he doth not in reſpect of his Seigniorſhip, there an Action of Trespafs *quare vi & armis* lieth againſt him. Co. *Magna Charta*, p. 105. 9 Rep. 76. *Combe's Caſe*, *Dier* 90. b.

Seiſin by Incroachment ſhall be avoided in Trespafs. 4 Rep. 11. b. *Bevill's Caſe.*

If the Lord diſtrain out of his Fee Trespafs lies. 2 *Inf.* 131.

When the Lord abuſeth his Authority given to him by the Law, he ſhall be puniſhed by Trespafs; as if he labour or kill a Diſtreſs. So againſt him that abuſeth a Damage Feſant, or he that enters to view the Repairs, breaks the Houſe. 8 Rep. 146. the ſix Carpenters Caſe.

Leſſee cuts down Trees to repair, and the Leſſor. Leſſor takes them away, Trespafs lies againſt him. 44 Ed. 3. 44.

This Action lies againſt the Lord who ejects and ouſts the Copy-holder, 4 Rep. 22. a. without lawful Cauſe. Co. *Lit.* 60. b.

It lies againſt the Lord of the Soil for digging Pits in the Common. *Siderf.* 106. *Goe and Coſher.* The Defendant pleads he is Lord of the Soil, and

dug for Coals, making so little Damage to the Pasture as he could, and avers he had left sufficient Common. *Per Cur.* this amounts to the general Issue. *Vide* 1 Keb. 936.

Against one
that is forced
to a Trespass.

If a Man drive my Cattle into the Land of another, he is a Trespasser and not I, and the Action shall be brought against him: and so it is if a Man by force carry me into the Land of another. *Stiles* p. 65. *Stone's Case*, and it may be pleaded in special Justification.

Against Tenant
at Will.

It lies against Tenant at Will who doth voluntary Waste. 5 Rep. 13. Co. Lit. 57. a. 2 Rolls Abr. 555. y. o. and for cutting Underwoods. 2 Ed. 4. 24. Pl. 25.

It lies against Grantee of Tenant at Will. *Vide prius.*

Against Tenant at Sufferance. *Vide prius.*

It lies by the Lessor against Tenant at Will for cutting the Trees down; for though he had Possession of the Land by lawful means, yet he had no Interest in the Trees for that purpose. *Savil* Rep. 84. *Walgrave and Somerset.*

Against Baylee:

Baylee of Goods, as of an Horse, &c. and kills them, the Baylee shall have a general Action of Trespass or Trover at election; *aliter* if there be Confidence reposed in the Person, and there is Negligence, an Action of the Case then lies. *Vide prius.* 5 Rep. 13. a. Earl of Salop's Case, Co. Lit. 57. a.

When the Privity of Baylment is determined by the Tortious Act of the Baylee, a special Action of the Case lies, but not Trespass. One delivers an Horse to ride to A. and he rides further to B. no Trespass lies. 1 Rolls Rep. 128.

Tres-

Trespafs *vi & armis* lies against a Servant for Against a Ser-
taking away his Master's Goods. 1 Leon. p. 87, vant.
88. *Glosse* and *Heyman. vide supra.*

In all cases where the Servant hath not a general nor special Property, Trespafs lies against him.
More, Hill. 29 Eliz.

If my Servant without my notice puts my Beasts into another Man's Land, my Servant is the Trespaffor, and not I. *Aliter* if my Wife put them in.
2 *Rolls Abr.* 553.

Defendant is found a sufficient Trespaffor, al- Against a Dis-
though he is but a Servant to the Pretended seisor.
Owner of the Land, and he which is true Owner
may bring this Action against Master or Servant:
the Master may withdraw himself. *Yelv.* 144.
Wilson and Weddell.

Trespafs doth not lie against an Executor; for Against an Ex-
Actio personalis moritur cum persona. Doct. and ecutor.
Stud. p. 75. i. e. for a Tort done by the Te-
stator.

Trespafs lies against an Alien. *Dig. Br.* 72. a. Against an Alien.

It lies against a Person attainted. *Mich.* 38, 39 Against a Per-
Eliz. C. B. Banister and Trussell. son attainted.

It lies against a Master of an Hospital and his Against a Ma-
Brethren. *No. Lib. Intr.* 248. a. ster of an Hos-
pital.

It lies against a Dean and Chapter. 32 H. 6. 8. Dean and Chap.
Pl. 13.

It lies against Mayor and Commonalty. *Quære* Mayor and
if *vi & armis*: but *Capias* lies not against them. Commonalty.

It

Ideot.

It lies against an Ideot.

Lunatick.

It lies against a Lunatick. *Hob. p. 134. Dig. Br. 72. A.*

Infant.

It lies against an Infant. *Dig. Br. 72.* If he appear by his Attorney and not by Guardian, it's Error. *2 Cro. 10. Bray's Case.*Trespafs against three, and one of the Defendants was an Infant at the time of the Plea by Attorney pleaded: *per Cur.* it's Error; but if he had been one of the Plaintiffs, and a Verdict past, it's no Error, but saved *per Stat. 21 Jac.* Judgment totally reversed, *1 Keb. 940. Topham.*

Parson.

It lies against a Parson for not taking away his Tithes in due time. *Stiles 372. Liniston's Case.* The Defendant pleads, the Plaintiff gave him no Notice to fetch away his Tithes.

Attorney.

Against an Attorney *per Billam. Ra. Entr. 610.*Against one
that commandsTrespafs lies against him who commands another to do a Trespafs. *Dr. and Stud. 19. a. vide Vaughan Rep. 116.* of Assistors in Trespafs when the Actors are acquitted.Against an
Interessee.If my Beasts are in the Yard of *J. S.* and during this time they do a Trespafs to another; he shall have Trespafs against me or *J. S.* at his Election. *2 Rolls Abr. 546. B. 1.*Against a Commoner for filling up Trenches made by the Lord. A Commoner cannot dig a Trench to meliorate the Ground. *1 Keb. 884, 936. Howard and Spencer.*

If

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If a Man who claims Common *appurtenant* puts in any Beasts which are not *Levant* and *Couchant*, he doth wrong to the Lord, and shall be punished as a Trespassor. 2 *Sanders* 327.

Against a Commissioner of Bankrupt, *per Cur.* Against a Commissioner of Bankrupt.
If the Plaintiff declares of the Entry into his House, the Defendant may not plead not guilty, and give the Special Matter in Evidence, but he ought to plead the Commission of Bankrupts and all the Special Matter. But if it had been for taking of Goods only, he may plead *non culp.* general. *Quer.* the Difference. *Lit. Rep.* 356.

Trespafs of Battery and *Faux Imprisonment* Against a Master of Chancery, by Bill in Chancery and Pleading and Issue; and after *Mittimus* out of the Chancery, these Issues were delivered here to be tried, *i. e.* in *B. R.* *Cro. Car.* 161. *Goodwin* versus Sir *Rich. Moor.*

I deliver my Goods to another to keep, &c. and he gives or sells them to a Stranger, I cannot have Action against the Stranger. Against a Stranger.

Lit. Sect. 70. If a Stranger buy my Goods of one that hath stollen them from me, in a Market, and knowing them to be stollen, this Action lies against either. *Doct.* and *Stud.* 149. a

CAP.

C A P. VIII.

Of the several Sorts of Trespases, or for what Matter Trespasse lies; with Notes on the Counts, and Pleadings thereon.

Trespases are Torts touching the $\left\{ \begin{array}{l} \text{Body,} \\ \text{Chattels,} \\ \text{Inheritance.} \end{array} \right.$

TORTS to the Body are Assault, Battery, Wounding, *Faux Imprisonment*.

Assault and Battery.

What amounts to an Assault.

If a Man hold me by the Arm, it is an Assault in Law.

So if one saith he will cut my Arm. *Quære de hoc.*

If one saith, If I will not cease my Suit he will beat me.

Challenge is an Assault.

Menace, so that a Man dare not tarry in Town.

If a Man strike at me with a Hatchet (although he do not touch me) it is an Assault.

If a Man deliver to another a *Subpœna*. 2 *Rolls Abr.* 545. *Quære.* For

In 2 *Bulstr.* 327. per *Dodderidge*, Words do not make an Assault.

The Intention as well as the Act makes an Assault, therefore if one strike another upon the Hand,

Hand, Arm or Breast, in Discourse, it's no Assault, because there was no Intention.

Holding up the Hand against another is Assault.
Mod. Rep. p. 3.

What shall be said to be a Battery.

Molliter Manus imposuit upon his Shoulder, and saith to *J. D.* that he hath a Warrant to arrest him from a Justice of Peace, this is not a Battery.

2. Rolls Abr. 546.

So if a Man deliver a *Subpœna* to another, this is not any Battery. *ibid.*

Counts upon Assault, Battery, Wounding, &c. and Imprisonment.

In Assault and Battery the Case upon Evidence was this: The Defendant drew a Sword, and waved it in a Menacing manner against the Plaintiff, but did not touch him; so the Jury were to find him guilty as to the Assault, but not of the Battery: and the Opinion of the Court was, that the Plaintiff was to have no more Costs than Damages. For the New Act excepts Actions of Assault and Battery; so that both must be proved.
1 Ventr. 256.

Assault and Battery against two Defendants, and declared of Assault, Battery, & *tantas minas de Vita sua imposuer'*, &c. they pleaded *son Assault demesne*. The Court held this no Error, which is not Law; though nothing be said to the *minas* yet it's good; for the *minas* is but to enforce the Damage. *More, Penruddock's Case.*

Declaration was *pro eo quod cum le Def. luy assault. Per Cur.* it's not good, it's not direct Averment. *1 Rolls Rep. p. 55. Sherland and Haughten.*

Because

The Law of Trespafs.

Because no Place was where the Battery was made, Judgment was arrested. *Lacth* 273. *Edsoll's Case*.

In Trespafs for Battery and *Faux Imprisonment*, the Plaintiff declares, *quod cum, &c.* The Defendant justifies by Process out of the Court of *Pie-Powders* in *New-Castle on Tyne*. Demur: but the Court, without regard to the Plea, though it was a Confession of the Matter in the Declaration, gave Judgment, *quod. Quer' nil cap. per Billam*: for by the [*cum*] the Declaration was defective in Substance, nothing being precisely affirmed. *Sir T. Jones* 197. *Chomly and Moreton*.

Baron and Feme.

In Trespafs by Baron and Feme of the Battery of the Wife, and taking the Goods of the Husband. On Not Guilty pleaded, Verdict was found for the Plaintiff for the Battery, and for the Defendant for the residue: and it was moved in arrest of Judgment, that the Action was not well brought as to the Goods, and the Severance by the Verdict had not cured it. *Hob. Reynel and Grey*, 2 Cr. *Buckly and Hales*, and the Judgment was stayed. 1 *Levinz.* p. 3. *Talbot and Bacon*.

Trespafs for Battery of the Wife, and taking from her an Apron and a Pinner. After Verdict *pro Quer.* moved in arrest of Judgment: 1. It is not said in whom the Property of the Apron and Pinner were; of the Wife it cannot be said, they may be of a Stranger, and then neither Husband nor Wife had Cause of Action. For then, 2. If they were the Goods of the Husband, the Wife ought not to join with him; and Judgment was stayed. 2 *Levinz.* 20. *Dunwell & Ux' versus Marshall*.

The Law of Trespafs.

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In Trespafs by Baron and Feme for beating of them both. Upon Not Guilty, the Verdict was so much Damage for beating the Husband, and so much for beating of the Wife. The Court said, That upon a Motion to arrest the Judgment, that the Plaintiff might release the Damages for the beating of himself, and take Judgment for the other. 1 Ventr. 328.

Bars to Trespafs of Assault, Battery, Wounding, Imprisonment, &c.

Three Degrees to avoid the Charge of Trespafs:

Inficiatio, Denyal,
Iustificatio,
Excusatio.

To Trespafs, the common Bar to Battery, Not Guilty. 3 Br. 400.

Or specially to the Trespafs, *son assault demesne*. 3 Br. 400.

In Trespafs of Assault, Battery and Wounding, &c. if the Defendant plead that the Plaintiff beat him first, then he Justifies the wounding; but if he justifie by arrest, or any other Cause which will bear him out only *molliter manus imponere*, then he pleads *quoad vulnerationem præd. superius fieri supponit* Not Guilty, and the Arrest or other Cause to the rest, and concludes, *quæ est eadem insult' verberatio & maletractatio*.

Wounding may not be justified in Defence of a Man's Possession: but, *per Coke*, a Man may justifie the Wounding in Defence of his Person. 1 Rolls Rep. 19. Butler and Austin. So 21 H. 6. 27.

Trespafs for Assault, Battery and Wounding. The Defendant pleads *son Assault demesne*. The Plaintiff

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Plaintiff demurs ; because the Wounding may not be justified. It seems to some it's a good Plea, because the Foundation of the Action is the Trespas, to which this Plea is proper. *Siderfin p. 246. Dance and Lucy.*

Assault and Battery.

*Bars, or Justifications
in Defence*

[of Himself,
of his Relations,
of his Goods,
of Land and Possession,
for Publick Good,
by Castigation,
by serving Procefs.

In Defence of Himself.

If a Man assault me, if I can well escape him, I may not beat him.

If a Man assault me, I am not bound to attend till the other hath given a Cut, but I may beat him in my own Defence. *2 Rolls Abr. 547.*

Son Assault Demesne.

That is, where a Man justifies in his Defence, as being first struck by the Plaintiff, and that he (the Defendant) struck in his own Defence.

In Appeal of *Mayhem*, *son assault demesne* is a good Justification ; if he plead Not Guilty, he cannot give in Evidence that it was *se defendendo* ; for that he ought to have pleaded it by way of Justification in Bar of the Action. *Co. on Magna Charta 316.*

In Trespas of Assault and Battery, a Man may justify in Defence of himself, or for the Preservation of his Possession of Land or Goods. *Co. 2 Inst.*

p. 316.

p. 316. But he cannot justify *Mayhem*; or Wounding, or Menace of Life, or Member. *ibid.*

Trespas for Assault, Battery and Wounding; the Defendant pleads *son assault demesne*: the Plaintiff demurs, because Wounding may not be justified by Plea. *Q. Siderfin* p. 246. p. 17. *Car. Car. 2. B. R. Dance and Lucy*. It was adjudged, That *son assault demesne* is a good Plea; the Count being *quod mutilavit* only. *1 Keb. 884, 921. mesme Case*. The Assault must be such as is just Ground of Terror, as holding up a Sword, or running at him, which is examinable on Evidence. *1 Keb. 921.*

The Form of Pleading Son assault demesne.

Ra. Ent. 611. Co. Ent. 644. Hern. 34. de insultu in servien. Ra. Entr. 613.

Trespas for Assault, Battery and Wounding. The Defendant said he was Constable of *D.* and for such a Mildemeanour of the Plaintiff's, he laid his Hands on him and carried him to the Stocks *quæ est ead.* and on Demurrer it was adjudged *pro Quer.* for the Defendant did not plead Not Guilty to the Wounding, nor justified it: But if one pleads that the Hurt which the Plaintiff had was of his own Assault, this is a good Answer to all. *Crb. Eliz. 268. Pendleberry versus Ellmott.*

Action of Battery was laid in the Declaration to be 18 Febr. the Defendant pleaded *son assault demesne*: at Issue the Defendant proved an Assault by the Plaintiff, but at another Day. This doth not prove the Issue for the Defendant; because the Justification shall refer to the time laid in the Declaration, if the Defendant doth not difference the Times in his Plea; and in such Case the Defendant shall shew that such a Day (other than that in the

H

Declae

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Declaration) the Plaintiff did him Assault, and traverse the Day in the Declaration at a Tryal.

In Defence of Relations.

The Husband may justify the Battery of another in the Defence of his Wife. 2 *Rolls Abr.* 546.

The Master may justify the Battery of another in Defence of his Servant. *ibid.*

The Servant may justify the Battery of another in Defence of his Master. *ibid.*

Defendant (a Justice of the Peace) justifies, because the Plaintiff's Wife being invited to a Funeral, refused to give place to the Defendant, *moliter manus imposuit*, to put her out of her Place, *Judgment pro Quer.* 3 *Keb.* 462. *Ashton and Jennings.*

In Defence of his Goods, Lands and Possession.

A Man may justify the Battery of another in Defence of his Goods.

If a Man will take Money out of my Purse, I may justify the Battery of him in Defence of this.

If a Man takes the Beasts of another Damage-feasant, and an Estranger will take them out of his Possession, he may well justify the Battery in Defence. 19 *H.* 6. 66.

Justific. in defence de cane odorisequo. Ra. Entr. 611.

The Defendant saith that the Plaintiff *tempore quo Clausum fregit, & Cuniculos ipsius Roberti ibid. invent. cum Retibus capere voluit, per quod Def. ut serviens al. R. & per son command. molit. manus imposuit*, to hinder him from taking them. This is not a good Justification. *Cro. Eliz.* 242. *Barret versus Havesett.* If

If a Man have Licence to erect a Booth in a Fair, and he being erecting it, another comes to pull it down, he may justify the holding of him by the Arms. 11 H. 6. 23.

Trespafs for killing a Mastiff Dog, the Defendant pleads the Mastiff was unmuzzled, and fell upon the Dog of A. in the Street, and he as Servant of A. killed him, it's an ill Plea; for he may not justify the killing of a Mastiff Dog in which I have Property, without reasonable Cause, and this is not here so, unless that he had pleaded that the Mastiff was so fixt, &c. that he could not part them without killing the Mastiff. He need not plead so had it been in a Warren. *Siderfin* p. 336. *Trin.* 19 *Car.* 2. *B. R.* *Wright* and *Rainscar*.

The Defendant pleads *son assault demefne* in an Action of Assault and Battery, the Plaintiff replied, That the Defendant would have forced his Horse from him, whereby he did *molliter insultum facere* on the Defendant, in Defence of his Possession. The Defendant demurs, ill Plea; it must have been, he did *molliter manus imponere*. One cannot justify the beating of a Man in defence of his Possession. Otherwise *Mod. Rep.* 36. *Jones* and *Trefilian.* 2 *Keb.* 597. *id.* Case.

If I lend an Horse to A. for two days, to ride to M. and from M. to B. he rides him to M. and so to London, I cannot justify Battery of him to repofsess my self of my Horse: for he hath a special Property during the two days, and I have other Remedy, *Yelv.* p. 172. *Lee's* Case.

In Defence of Land and Possession.

A Man may justify the Battery of another in defence of his Possession, but not the Wounding. *Co.* 2 *Inst.* 316.

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If a Man come into a Forest in the Night, the Forester may not beat him before Relistance made by him. 2 *Rolls Abr.* 548. G.

A Man erecting a Booth in a Fair by Licence, and a Stranger throws it down; yet he may not justify the Battery. *Vide supra.*

I may justify the Battery of another who will enter into my House. 2 *Rolls Abr.* 548. G. 7. *Lawrence's Case.*

Trespas of Assault, Battery and Wounding; the Plaintiff justifies in defence of his Orchard, *quod molliter manus imposuit. Per Cur.* it's ill. But had it been *molliter manus imposuit*, and that the Plaintiff resisted, and thereupon the Defendant, &c. It hath been resolved that *molliter manus, &c.* the Defendant took up Stones and threw at the Plaintiff in defence of his Quarry, was no sufficient Justification. 3 *Keb.* 468. *Knightbridge's Case.* So of his Possession or Person. 2 *Rolls Abr.* 568. *Cole and Mander.*

The Defendant justified, for that the Plaintiff entred his Close, and that he *molliter manus imposuit.* Q. If he ought to shew what Estate he had in the Close, and that the Plaintiff came there to eject him. *Moor, Smith and Bull's Case.*

*Justification for Publick Good, and for hindring
Mischief, or preventing Disturbance and In-
decencies in God's Service.*

A. plays at Dice with B. in the House of a Justice of Peace, which B. was a Cheater, and the Defendant justifies in Battery, That he for the Cause aforesaid put his Hands upon him to bring him before the said Justice, who bound him over, and he was convicted as a Common Cheat. *Cro. Car. p. 234. Holliday and Oxenbridge.*

A. sets a Dog upon B. an Infant, and upon this
this

this C. comes to A. and puts his Hand *molliter* upon him to stay him. This is justifiable. 2 *Rolls Abr.* 546. C. 3. *Walter and Jones.*

In Assault and Battery in C. in *Com. R.* the Defendant justifies, That at such a Place in the County of L. one J. a Curate, was performing Divine Service and Funeral Obsequies, and the Plaintiff did maliciously disturb him; and the Defendant did require him to desist; and because he would not, they to remove him did *molliter manus imponere, &c. absque hoc*, that they were not guilty of any Assault in *Com. R.* or elsewhere *extra Comitatu. L.* It's a good Plea: for the Plaintiff, for this Disturbance, was a Nuisance to them all. *Mod. Rep.* 168. *Glover and Hinde.*

In Assault, the Defendant justified as Church-Warden, That he pulled off the Plaintiff's Hat, he sitting covered in time of Divine Service, having requested him to pull it off. It's good. So to switch Boys playing in the Church-Yard. 2 *Keb.* 124. *Haw and Planner.* 1 *Sanders Rep.* 12. *mesme case.* The Form of pleading this, *vide* in *Sanders.*

One may tie a Mad-man, or catch one that is falling into Fire or Water, with Violence, &c. and justify it.

One may part two Men fighting, &c.

Justiff. per mandat' Majoris de F. ad removend' Quer' qui non habuit Votum in Electione Burgi Parl. ab eis qui habuere Votum & fuer' in Electione, &c. *Tomps.* 306, 307.

Bar, quod molliter manus imposuit super Quer' & A. pugnanti' ad eos seperandi. *Ra. Entr.* 613. 2 *Browne* 143. *Tomps.* 336. 394.

Quod Quer' insult' fecit in J. & Def. ad conservand' pacem, &c. 2 *Browne* 137, 138.

Quod Quer' insult' fecit in W. & Def. retraxit eum ne majus dampnum fieret. *Ra. Entr.* 612.

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Deux Defendants pleads son assault seperatim, & alius Def. plede molliter manus imposuit pro preservatione Pacis & ad al^o Def. & quer^o invicem seperand^o. Tomps. 408.

Justif. Assault, quod Def. fuit Guardianus Ecclesie, & quod Quer^o tempore celebrationis Divinae Servitij strepitum fecit, & sic Defend^o ad compelland^o e Quer^o ex Ecclesia ire, fecit le Trespas. Tomps. 326. Reg. 612.

Justification of Assault by moderate Correction or Castigation.

The Defendant pleads the Plaintiff was his Servant, and for neglect of his Service *molliter manus imposuit, &c. quæ est ead^a vulneratio*; and further he pleads, That such a Day and Place that the Plaintiff *exoneravit, relaxavit & quiete clamavit* to the Defendant all Actions. *Per Cur^o* the Plea is double, and it should have been he released *per Scriptum. Siderfin p. 175. Bleek and Grove.* In this Case he ought to shew a Retainer, though in a *per quod Servitium amisit* he need not.

In Trespas for Battery brought by a Scholar, the Defendant pleads, he was his Schoolmaster *ad erudiend^o & informand^o in facultate Legendi, &c.* and so it ought to be, for he may be a Schoolmaster *in mala arte. Siderfin 175.*

The Defendant justified because the Plaintiff is his Servant. and for neglect *moderate castigavit.* The Plaintiff replies, *non moderate castigavit,* and *Issue pro Quer^o.* It ought to be *de injuria sua propria*, yet now it's good *per Stat. Car. 2. Siderfin 444. Aubrey's Case. 2 Keb. 623. mesme Case.*

Justifi.

Justification by serving Process, and by assisting Officers.

Transf. for Assault and Battery of the Wife in *L.* The Defendant pleads *Non culp.* to the Battery. And to the Assault, That in *D.* in another County at the View of Frank-pledge, a Warrant was made to the Defendant, then Constable, to take *A. G.* and to carry her to the Cook-Stool, by Force of which he commanded the other to assist him to execute the Warrant, whereby they came into the Plaintiff's House, the Door being open, to enquire for *A. G.* where the Plaintiff's Wife made an Assault upon them, and the Constable commands the other Defendant *molliter manus imponere, quæ est ead' Transgressio, absque hoc* that they were guilty in *L. vel alibi, vel alio modo extra D. præd'* within the Realm of England. The Plaintiff demurs; many Exceptions were taken to the Warrant; but *per Cur'* the pleading the Warrant was only Inducement, and if there had been no Warrant in the Plea, the Justification had been good enough. *Quære* if the Traverse be good. *Vide Tit. Traverse.*

The Defendant justifies by Force of a Warrant directed to him and to two others, or either of them, to arrest the Plaintiff; and shews, that he himself and one other of the two arrested him; yet this is good. *Vide Hobbs and King's Case, 1 Rolls Rep. and p. 406. Walcott and Empson.*

Justification by Process out of the Sheriff's Court in *London.* He saith there was a Plaint in such a Court before *L. M.* and doth not alledge a Custom to hold Court before the Sheriffs, and that *F. M.* was then Sheriff. 2. It's said *coram F. M. uno Vicecomit'*, which is well enough, there being two Courts, though they are but one Sheriff; the Writ

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is *Vicecommitibus London*, but *Vicecomiti Midd.*
1 *Keb.* 564. *Osborn and Parker.*

Trespas by Baron and Feme for Battery done to them both, *ad dampnum ipsorum*. The Defendant pleaded Not Guilty, and found for him, and certified that he did it as Constable in the Execution of his Office; and double Costs were granted according to Stat. 7 *fac.* 5. though the Declaration was ill; for Husband and Wife cannot join for Battery done to them both; for the Vexation appears. *Cro. Car.* 175. *Heyler's Case.*

Justification by Process out of an Inferior Court of Record.

It is not good without shewing whether the Court be held by Charter or Prescription. Sir *T. Jones*, *Strode* and *Deering*.

Courts not of Record.

Trespas for the taking of his Cattle, and detaining them till he was forced to pay 2 *l.* 8 *s.* 2 *d.* the Defendant justified that *J. S.* levied the Plaintiff in the County-Court in a Plea of Debt of 39 *s.* 11 *d.* against the now Plaintiff, & *super inde taliter processum fuit*, that he recovered the said Debt, and eight Shillings and four Pence for Costs of Suit; *prout per processum inde in Cur' Com' prad' remanen' plenius apparet*, & *super quo ad prosecutionem ipsius J. S. quoddam praecept' extra Cur' Com' prad' emanavit*, per quod praeceptum the Sheriff commanded the Defendant to levy the Money, &c. by Virtue of which Precept he took the Cattle and detained them till the Plaintiff had paid the Money. The Plaintiff demurred, and adjudged for him.

I. Because

1. Because when a Judgment is pleaded in an inferior Court, especially in a Court not of Record, the Proceedings should be set forth at large, and not to say, *taliter processum fuit*.

2. It is not shewed that the Debt arose within the Jurisdiction.

3. It doth not appear that the Court awarded the Precept; it is only said, *quoddam præcept' e Curia emanavit, per quod* the Sheriff commanded, &c. Whereas the Suitors are the Judges; it should be *per quod præceptum per præfat' Cur' directum fuit, &c.* 2 Ventr. 100. Pinager and Gale.

Excuse of Assault and Battery.

One Train-Soldier hurts another in Skirmishing, and the Defendant pleads that *casualiter & per infortunium, & contra voluntatem suam* in discharging of his Piece he did hurt and wound the Plaintiff, which is the same, &c. *absque hoc* that he was guilty *aliter sive alio modo*. The Plaintiff demurs, and Judgment for him. But had the Defendant said the Plaintiff ran cross his Piece when it was discharging, or set forth the Case with it's Circumstances, so as it had appeared to the Court it had been inevitable, it had been good. *Hob. p. 134. Weaver and Ward.* He ought to have further said, he could not avoid the Fact. *Moore me/me Case.*

No Man shall be excused in Trespass (for this is the Nature of an Excuse and not of a Justification *prout ei bene licuit*) except it may be judged utterly without his fault. *Hobart p. 134. Weaver and Ward.*

If two Masters of Defence playing their Prize hurt one the other, Trespass lies; but if one kill the other it's no Felony. *Hobart p. 134.*

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Iustif. quod Quer' tempore Transgressionis & insult' fuit un Evesdropper. 2 Browne. 178.

Quod Def. fuit Sagittans cum Arcu longo ad Metas, & Quer' negligenter venit prope Metas, & ibid. contra voluntat' Def. fuit vulneratus in Pede cum Sagitta. 1 Br. 188.

C A P. IX.

What amounts to false Imprisonment, where the Action to be brought, of the Writ, Declaration and Pleadings in Bar, in Justification.

Faux Imprisonment what it is, and when it shall be said to be so, or not.

IF a Serjeant in London refuse to accept Bail, Action of Faux Imprisonment *vi & armis* doth not lie, but Action upon the Case. *Cro. Car. 296. Salmon and Perciwall.*

If a Bailiff of a Sheriff refuse to accept Bail, this Action lies not. *2 Rolls Abr. 562. 10. Adams's Case.*

If a Sheriff makes no Return, or a *Faux Return*, after the Party is arrested, it is *Faux Imprisonment* in the Sheriff, and so of his Bayliffs. *2 Rolls Abr. 562, 563. Parker and Moss. Vide supra.*

A Prisoner shall have *Faux Imprisonment* against his Keeper if he remove him out of the Prison into another County or Liberty. *Dier 66. Pl. 12.*

A. procures the Sheriff to arrest *B.* without Writ, and after purchaseth a Writ, and the Sheriff arrest the Party being in his Custody, an Action of *Faux Imprisonment* lies. *Dier* 244. *Pl.* 61.

Process issues to take a *Feme Sole*, and before she be taken she becomes a *Feme Covert*, and then is taken, Action of *Faux Imprisonment* lies. 2 *Bulst.* 80, 81. *Doyly* and *White*.

A *Capias* issues against *J. G.* of *Dale*, Gent. and there are two of the same Name and Mystery within the same Village; the Sheriff at his Peril ought to take him which is sued. *Brok. Tit. Faux Imprisonment. Pl.* 19. 11. *H.* 4. 91.

The Writ against the Plaintiff was retornable *Octab. Purif.* (9 *Febr.*) the Defendant (the Sheriff's Bailiff) takes him the 10th of *Febr.* and before the *4to die post*, it's unlawful. *Siderf.* 229. *Ellis* and *Jackson. Mich.* 16 *Car.* 2.

Trespas quare vi & armis in Annam Filiam suam insultum fecit, & ipsam cepit & imprisonavit. The Father shall not have this Action; for none shall have Remedy for the Imprisonment, but the Party to whom the Wrong is done. *Cro. Eliz.* 770. *Barham* and *Dennis*.

Where the Action to be brought, vid. Venire.

Vid. Justific. Le Rule.

Per Stat. 21 Jac. c. 12. if any Action, Bill, Plaint or Suit upon the Case, Trespas, Beating or Imprisonment, shall be brought against any Justice of the Peace, Mayor or Bailiff of City or Town Corporate, Headborough, Portreeve, Constable, Tithing-man, &c. or any of them, or any other who in their Aid or Assistance, or by their Commandment shall do any thing touching or concerning his or their Office or Offices, for or concerning any Matter Cause or Thing by them
or

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or any of them done by Virtue or Reason of any of their Office or Offices, that the said Action, Bill, Plaint or Suit shall be laid within the County where the Trespass or Fact shall be done or committed, and not elsewhere; and if upon the Trial in such Cases the Plaintiff therein shall not prove to the Jury that the Trespass, Beating, Imprisonment, or other Fact or Cause of Action, was had and made within the County wherein such Action shall be laid, that then the Jury shall find the Defendants not guilty, without having regard to any Evidence given by the Plaintiff, &c.

The Writ.

Faux Imprisonment is brought by two; the Writ shall abate; they ought to sever in Actions.

Declaration.

The Declaration is, *cepit & imprisonavit*. The Defendant pleads a Plea by Warrant from the Sheriff in a *Ca. Sa.* The Plaintiff replies, That a *Superfedeas* was delivered to the Sheriff, and yet after he detained him in Prison; but saith nothing of the Caption whereof he complained in his Declaration, and so maintained not his Count. Judgment *pro Def.* for this Cause. *Cro. Eliz. p. 404. Stringar and Sanlack. Vide supra* in Assault, Battery and Imprisonment.

After a Verdict it hath been ruled, that it's good enough to say, one had imprisoned him for a long time, and *Rolls* conceived the Case in *Hobart* not well printed. *Stiles p. 171. in Ireland's Case.*

Justifi.

Justification to false Imprisonment, or where and in what Cases a Man may Justify the Imprisonment of another, and where not.

By Officers.

Take this for a Rule:

The Justification shall be good though the Act be tortious, for that it was done by Order of Law. As,

The Sheriff may justify executing the Process of the Court, although it is erroneous: as if a *Capias* comes to him without any Original, and he executes it. So if a *Capias* or an *Exigent* comes against a Duke or an Earl. 6 Rep. 54. 9 Rep. 68. 10 Rep. 70, 76. Dier 61. Hob. p. 48.

Justification by Warrant out of *Durham*, though the Proceedings were irregular; yet seeing they could grant a *Capias*, that excuseth the Officer. Mod. Rep. 170.

Justice of Peace errs in his Warrant, yet he that makes the arrest shall be punished in *faux Imprisonment*. So in Distress. 2 Rolls Abr. 560. Nicholl's Case.

Bail is taken by *Capias* where it ought to be *Scire Facias*, yet justifiable per l'Officer. 10 Car. B. R. Seaborn and Savaker, 2 Rolls Abr. 560.

By an Officer for Ill Behaviour.

The Sheriff or other Officer meets with a Man who misbehaves himself, he may commit him to Prison and Justify. 2 Bulstr. 328. 9. 2 Br. 221.

In *faux Imprisonment*, the Defendant justifies, that he was Sheriff of *London*, and had arrested one *Clare*, who had escaped, and in Pursuit of him about nine a Clock at Night in *February* the Plaintiff

tiff met him and used him indecently, & luy detrusit usq; ad murum, & permulta verba incivilia a luy dedit, super quo il inveniens le Plaintiff vagrantem in nocte & male gestant' versus luy, il luy imprison', &c. Per Cur. the Justification is good; for all being joined together is a good Cause of Imprisonment. If a Man do such an act against a Constable, it's a good Cause of Imprisonment; and a Constable may arrest a Man for breaking the Peace upon himself. 1 *Rolls Rep.* p. 237. *Chune and Piott.* 2 *Bulstr.* p. 328. *mesme Case.*

The Defendants being Justices of the Peace do justify per Stat. 1 *Marie*, made against Disturbers of Preachers in the Church. Vide an excellent Argument as to the Pleadings in this Case by all the Judges of the King's Bench about Misrecital of the Statute. 2 *Bulstr.* 47. *Creswick and Rookesby.*

One may justify Imprisonment for Suspicion of Felony, if the Suspicion be violent. 3 *Leon.* p. 233. *Sparrie's Case.* *Dier* p. 236. *Pl.* 26. & 12 *Rep.* 92. But one may not arrest for Felony upon another Man's Suspicion. 2 *H.* 7. 15. 15 *H.* 7. 5. 20 *H.* 7. 12. *Dier* 222. For Suspicion of Hue and Cry one may. 2 *Rolls Abr.* 559. 2 *Bulstr.* 259. 10 *Rep.* 76.

One called the Mayor of B. a Fool, the Mayor cannot justify the imprisoning him. *Aliter* had the Mayor been in Publick Place of Justice. *Cro. Eliz.* p. 78. *Simons and Sweet.*

The Defendant Justifies that Sir R. L. being Lord Mayor and Justice of Peace in London, pro diversis Causis eid. Majori bene cognit', commanded him, being Serjeant at Mace, to imprison the Plaintiff. Ill Plea: for he ought to shew the Cause of the Imprisonment, so as the Court may judge whether it be lawful or not. *Cro. Jac.* 81. *Boucher's Case.*

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ix

Trespas for Battery and Imprisonment. The Defendant justifies by Execution of a Writ: but upon the Plea it appears to be executed after the Day of the Return, but before the *quarto die post*, and the Execution was adjudged to be illegal. *Moore* 733: *Cro.* 3. 180. Judgment *pro Quer.* 1 *Levinz* 143. *Ellis and Jackson.* *Windham* cited a Case to be, where the Writ by the Roll was award returned upon *Wednesday*, and it was made returnable upon *Thursday*, and executed upon the *Thursday*, and the Writ ordered to be amended according to the Roll, and the Execution upon the *Thursday* void.

Trespas and *faux Imprisonment* in *London*. The Defendant pleads *J. S.* sued forth a Writ of *Latitat* the last day of *Trinity-Term*, directed to the Sheriff of *R.* and by Virtue of that the Sheriff of the said County made a Warrant to the Defendant, and he upon that took the Plaintiff, which is the same imprisonment, *absque hoc*, that he is guilty in *London, vel alit. vel alio modo.* The Plaintiff replies, That the said Writ was truly prosecuted after the Imprisonment (*viz.*) the 9th Day of *August.* The Defendant demurs. And adjudged *pro Quer.* because although the *Teste* of the Writ be upon Record, and the Plaintiff cannot aver against it, yet here great Inconveniencies will be, if the Plaintiff cannot set forth the very time of the Purchase of the Writ, and the Relation of the *Teste* is only to prevent Fraud, and not to justify a Tort: and Judgment *pro Quer.* *Raym.* 161. *Bilton versus Johnson, &c.*

Trespas of Battery and Imprisonment. The Defendant justifies by Writ out of the King's Bench directed to the Sheriff, and a Warrant upon it made to him. The Plaintiff demurs specially, for that it is not pleaded that the Writ was delivered to the Sheriff as the usual Form is. *Per Cur.* it need

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need not be so pleaded; for if in Truth a Writ be sued, although he make a Warrant before it comes to his Hands it is legal, and the Presidents are both ways. 2 *Levinz* 19. *Jones and Green*.

By Sheriffs Bailiffs.

If the Sheriff makes a false Return, or no Return, he cannot justify the Arrest. As *Capias* in Process issues against *J. S.* and the Sheriff takes him, and after returns *non est inventus*, or makes no Return, he is a Trespassor *ab initio*, and *faux Imprisonment* lies against him. So if a *Capia* in an Inferior Court directed to an Officer to take *J. S.* and he takes him, and doth not return the Process. So if Bailiffs, Errant or Special, take a Man, and the Sheriff doth not return the Writ, they are Trespassors. 2 *Rolls Abr.* 563. *How's Case*.

In Trespas of *faux Imprisonment* against a Sheriff and Bailiff, they justified by Warrant on Writ to the Sheriff. The Plaintiff replies no Writ was then taken out. The Defendant demurs. Judgment *pro Quer.* For albeit the Bailiff hath a Warrant, yet he is liable if there be no Writ. 2 *Keb.* 705. *Pluncknet and Green*.

The Defendant justified by *Latitat* to the Sheriff and Warrant to himself; to which the Plaintiff demurs specially, because it's not shewed that any Writ was delivered to the Sheriff before the Arrest, nor Warrant made before the Arrest. *Per Cur.* this is no essential Matter, nor traversable; and the Plaintiff might have replied the Arrest was before the Delivery of the Writ; else the Court will intend it delivered, it being said, that *Virtute* of a Writ delivered to the Sheriff and a Warrant, the Defendant arrested. 2. *Except.* It's not averred the Writ was returned, *sed non allocatur*; for though Bailiff of a Liberty must return his Precept,

cept, yet Bailiff *itinerant* need not. 2 *Keb.* 338, 844. *Green and Jones.* And by his Demurrer the Plaintiff hath admitted the Delivery of the Writ, though he hath shewed the want of Averment for Cause. 3 *Sanders* 298.

The Sheriff, after having received Execution-Money, ought not to arrest the Party, and if he be arrested, he may well discharge him, *per Clinch* and *Gawdy.* *Cro. Eliz.* p. 404. *Stringar* and *Stanlack.*

Faux Imprisonment against an Under-Sheriff. The Defendant pleads, the Plaintiff was taken in Execution upon Process out of the Exchequer at the King's Suit, and that afterwards he was served with a *Latitat* out of the King's Bench at the Suit of *B.* and that after one *H.* was made Sheriff of the said County, and he was his Under-Sheriff, and the old Sheriff delivered the Plaintiff over to him. The Plaintiff replies, That after the Delivery over to the Defendant, a *Supersedeas* was directed out of the Exchequer to deliver him if he were taken, and that notwithstanding this, he after detains him in Prison *ea de causa & non alia*: and further for the other Cause, That after the Delivery over, *B.* the Plaintiff in the *Latitat*, discharged and released the Action, and required the Defendant to deliver him, and yet he would detain him. The Defendant demurs: 1. Because the Action is brought for the Caption and Imprisonment, and in the Replication he maintains by Cause of a Detainer after a Discharge, and so a Departure. *Per Cur.* the Detainer is a Caption and new Imprisonment. 2. Because the Detainer is lawful after *Supersedeas* directed, he being taken. *Per Cur.* in the Exchequer they have Power to discharge a Man in Execution, and the *Supersedeas* was a sufficient Discharge. As to a third Point, the Court held, the Party Plaintiff may discharge him if he
I make

make an Agreement with the Party. If a Man be in Execution, if he at whose Suit he is in Execution command the Sheriff to deliver him, if he detain him after in Prison, action of *Faux Imprisonment* lies against him, and he cannot justify it. Judgment *pro Quer.* 1 *Rolls Rep.* 240. *Witbers and Henly*, 2 *Bulstrop* 96. *mesme Case.*

As the Sheriff may not justify the detaining his Prisoner after a *Supersedeas*, so neither may he justify the retaking of one whom he hath arrested upon Process, and let to Bail, and returned *Cepi Corpus*, after an *Habeas Corpus* delivered to him to remove the Body. 2 *Rolls Abr.* p. 558. *Layes Case.*

If he arrest the Party after a *Supersedeas* (though he knows nothing of it) it's *faux Imprisonment.* *Cro. Eliz.* 98.

Action against the Defendant of *faux Imprisonment.* Now *Faux Imprisonment* doth not lie against a Sheriff for refusing sufficient Bail, but Action on the Case. 2 *Mod.* 31. *Smith and Hall.*

After Plaint entered in the Porter's Book, and before Entry before the Sheriff in the Counter, a Man may be arrested. 9 *Rep.* 68.

The Defendant justifies by arrest on *Lqtitat.* the Plaintiff replies, The Writ was taken out after the Arrest. The Defendant demurs, and Judgment *pro Quer.* 3 *Keb.* 213. *Chancy and Ruster.*

The Defendant justifies an Arrest *quousque* Bond given to appear in the King's Bench, *absque hoc* that at any time he did arrest without reasonable Cause until he gave such Bond. *Per Cur.* the Justification is good; and the Plaintiff should have traversed *absque hoc* that he was arrested and detained till Obligation to appear in *B. R.* having counted that this was taken on Attachment out of Chancery, and *nil cap. per Billam* awarded *sur Demurr.* 3 *Keb.* 165. *Dawson and Rawlison.*

For

For all the Imprisonment, except eleven Hours, the Defendant pleads Not Guilty; and to the Imprisonment for eleven Hours he justifies as Sheriff, for that the Plaintiff hindered him in the Execution of his Office, and saith nothing to the *vi & armis*, yet good. 1 *Sanders* 81. *Law and King*. and there *vide Forme del Pleading*.

In this Case of *Law and King*, the Defendant justified as Sheriff of *Coventry* to arrest him for the Breach of the Peace upon him *in Executione Officij*, whereby he arrested him and brought him before the Mayor, and traverseth all the time before, that he was Sheriff and after, and the Traverse adjudged good although it was objected to be too lazy. 1 *Levinz*. 216.

After the Day of the Return the Sheriff cannot justify executing, &c. but on the Return Day he may. 1 *Keb*. 805.

The Defendant (a Serjeant) justifies by reason of a Plaint entred. The Plaintiff replies, That after the Arrest he tendered him sufficient Bail, (*viz.*) *J. S.* and *J. D.* notwithstanding which he detain'd him in Prison, & *hoc*, &c. *Per Cur.* when he justifies the Arrest and Imprisonment, his refusal of Bail makes not the Arrest and Imprisonment tortious so as to have Trespass; perhaps Action on the Case lies. *Cro. Car.* 196. *Salmon* and *Percivall*.

If the Sheriff himself justifies by Writ, it's no Plea without shewing the Return of the Writ; but *aliter* of a Sheriff's Bailiff, for he hath no means to enforce the Sheriff to make Return thereof, and what he did was legal. *Cro. Car.* 447. *Girling's Case*.

The Defendant justified that he had a Warrant to arrest *J. D.* and he demanded of the Plaintiff what was his Name. He answered, His Name was *J. D.* and therefore he arrested him. Ad-

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judged for the Plaintiff, for the Defendant at his Peril ought to take notice of the Party. *Moore, Coote and Lighworib's Case.*

Trespas by the Plaintiff, being a Parson, for the taking of his Beasts. The Defendant justifies by Warrant of a Justice of the Peace to take them for a Levy for repairing of High Ways. The Plaintiff demurs, pretending that the Lands of the Church are not subject to such Charge. But *per Hale & Cur.* new Charges by Statute they are subject as others, if not excepted: and Judgment *pro Def.* 2 *Levinz.* 139. *Webb and Batchelor.*

In Trespas and *faux Imprisonment* the Defendant justified for that a general Quarter-Sessions of the Peace was held 9 Oct. 27 Car. 2. and that the Justices make a Warrant to him to bring the Defendant to the Sessions; and that he 10 Oct. *Virtute Warranti præd.* took the Defendant for to bring him to the Session, and detained him for a Quarter of an Hour, and then the Defendant rescued himself. On which the Plaintiff demurs generally; and adjudged for him; for the Bar is ill, not averring the continuance of the Session 10 Oct. for otherwise it shall not be intended, nor the saying he took him *Virtute Warrant' præd.* will supply it. 2 *Levinz.* 229. *Doughty and Mills.*

Justification by Assistants to Sheriff or Bailiff.

The Sheriff makes a Warrant to the Bailiffs to arrest *J. S.* and they have arrested him, and they intreat *J. D.* to keep him until he be delivered by the Sheriff; this is justifiable by *J. D.* in an Action of *faux Imprisonment* against him. *Cro. Car. p. 446. Girling and Allen.* So if a Stranger, after the arrest of a Prisoner, comes in Aid of the Bailiffs, and aid them to keep him in their Custody

dy by Command of the Bailiffs, this is justifiable.
2 *Rolls Abr.* 561.

That the Defendant came to assist the Sheriff in a *Vi Laica removenda*, and there *querentem in domibus prædict. ad pacem Domini Regis disturbant. eos resistentem invenerunt* : a good Justification. 2 *Rolls Rep.* 177. Parson Closses Case.

Trespas of Battery and Imprisonment. 13 June 23 Car. 2. The Defendant pleads, That 16 Mar. an Attachment issued out of Chancery to the Sheriff, and that the Sheriff after the Delivery of the Writ to him, 27 May makes his Warrant to the Defendant his Bail, by which he took him *eodem 27 die Maij*, and traverseth all times before the Warrant or after the Return of the Writ. The Plaintiff maintains his Declaration, *absque hoc* that the Writ was delivered to the Sheriff before the Battery and Imprisonment. The Defendant rejoins, That before the Return of the Writ it was delivered to the Sheriff, *viz.* the said 27th day of May, and that before the Arrest he had no notice but that it was delivered to the Sheriff. The Defendant rebuts as before, That he had not notice but that the Writ was delivered to the Sheriff before the Arrest, & *de hoc ponit, &c.* The Plaintiff demurs, Judgment *pro Defendente*.

1. It's not material if the Writ be delivered to the Sheriff before the Warrant and Arrest, so long as in *rei veritate* there is a Writ, which warrants all.

2. There being a Writ and Warrant upon it, the Bailiff shall not be charged for the executing of it; for he is not privy, nor hath notice of the time of the delivery of it to the Sheriff, and he had tendered an Issue of the notice, which the Plaintiff had refused to accept. 3 *Levinz.* 93. *Osborne and Brookhouse*.

Justification by a Constable.

In Trespafs for breaking his House, the Defendant justifies as Constable, by Virtue of a Warrant to him directed from a Justice of Peace for the taking the Plaintiff and bringing him to answer, and by this he broke open the Door at eleven of the Clock at Night, &c. *Per Cur.* by this general Warrant he cannot justify unless for Felony or Treason. 1 *Bulstr.* 146. *Foster and Hill.*

The Defendant justified he was Constable, and the Plaintiff being in Presence of a Justice of Peace, not having opportunity to examine him, commanded the Defendant to take the Plaintiff into his Custody till the next day, which he did. It's a good Justification without alledging what Cause the Justice had to examine him. *Q. More, Broughton and Mulshoe's Case.*

The Defendant saith he was Constable, &c. and that the Plaintiff the said Year, Day and Place, brought an Infant, not above the Age of ten Years, in his Arms, and left him on the Ground, and that he commanded the Plaintiff to take up the said Infant and carry it away, which he refused to do, for which Cause he committed the Plaintiff to the Stocks. A good Justification. *Popbam Rep.* 12. *Cro. Eliz.* 287. *Beal and Charter.* Vide the same Case 1 *Leon.* 327. a little more fully reported.

If a Constable sees any breaking the Peace, he may take and imprison him until he find Surety by Obligation to keep the Peace. *ibid.*

The Defendant justifies as Constable, for breaking the Peace upon himself. 1 *Rolls Rep.* 237. *Chune and Piott.*

The Defendant justifies that he was Constable of B. and that he appointed the Plaintiff to watch there, and because he refused he put him in the Stocks. It's an ill Plea, because the Defendant doth not shew the Plaintiff was an Inhabitant there; and he cannot appoint a Stranger to Watch by any Statute. *Crok. Eliz. 204. Stretton and Browne.*

In *faux Imprisonment*, it's justifiable by a Deputy-Constable by Virtue of a Warrant. 1 *Rolls Rep. 274. Phelps and Winchcomb*; and also he is within the Stat. 7 *Jac. c. 5.* for Costs.

Trespas and Battery. On Not Guilty, a special Verdict. The Plaintiff being complained of to a Justice of Peace, he makes a Warrant to the Defendant to take the Plaintiff, and to find Sureties for the Good Behaviour, the Defendant being Constable, executes the Warrant on a *Sunday*, and whether it be good within the late Statute, which says, That all Process executed upon a *Sunday*, other than for the Peace, shall be void. Resolved for the Defendant. A Warrant for the Good Behaviour is a Warrant for the Peace and more; and this Statute is to be favourably extended for the Peace, and this Judgment was affirmed in Error in *B. R. Raym. 250. Johnson against Colson.*

Of Justification by Warrants, Precepts of Sheriffs, Mayors, Marshals, &c. and Pleadings thereon.

In some Cases it may be good, though no Cause be expressed in the Warrant; and the Tip-Staff of the King's Bench may justify the Imprisonment of a Man by a Parol-Warrant of the Chief Justice. 2 *Rolls Abr. 558. Sir George Throgmorton and Allen*; though it be regularly true, that

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If a Man will justify the Imprisonment of another by Warrant, he ought to shew the Warrant.
10 Rep. 92. a.

In *faux Imprisonment*, the Defendant justifies by a Warrant of the Sheriff on a *Latitat*. The Plaintiff replies, *De Injuria sua propria*. On demurrer this is naught, being matter of Record: yet upon Issue and after a Verdict, it's a Jeofail, the Issue being in the affirmative.

The Defendant justifies Imprisonment of the Wife by Precept in *Warwick*, returnable *ad proximam Curiam*, not saying at what day. *Per Cur.* the Process is good enough, *contra* to *Dier. 2 Keb. p. 702. Gibs* against *Stratford*.

Note, a Justice of Peace his Warrant is not always a Security. As the Church-Wardens of *D.* tax the Inhabitants of *S.* to the Poor of the Parish of *D.* and for default of Payment have the Justices Warrant upon Stat. 43 *Eliz.* and the Church-Wardens take a Distress of the Inhabitants of *S.* They brought Trespafs. This Warrant will not justify them: for the Church-Wardens and Justices had no Power to Charge them. 10 *Car. B. R. Rot. 222. Nichols* and *Walker*.

In an Action of Assault, Battery and Imprisonment till the Plaintiff had paid 11 *l.* 10 *s.* the Defendant pleads and justifies by reason of an Execution and a Warrant thereupon for eleven Pounds, and mentions not the ten Shillings; and on demurrer, for this Cause Judgment was given *pro Quer.* upon the first opening; because it appears that the Defendant took more than was warranted by the Execution. 2 *Mod. 177. Harding* and *Ferne*.

The Defendant justifies, That the Court of the *Marshalsea* hath Jurisdiction to hold all Pleas of Trespases within the Verge; and shews, That he himself affirmed a Plaint of Trespafs in the *Marshal's*

shal's Court, &c. and a Precept was made to the Marshal *ad habend.* his Body at the next Court, &c. and the Officer (*Portator Virgæ*) took him, and the Defendant came in Aid of the Officer, &c. The Plea is ill; for it saith, the Precept or *Capias* is returnable at the next Court, and it is not upon any day certain; for so he may be detained in Prison a long time, not knowing when the Court shall be holden. *Cro. Jac. 314. Johns and Smith.*

The Sheriff makes his Warrant to three Bailiffs to do Execution *conjunctim & divisim*, and two execute it, it's good enough. *2 Rolls Rep. 138. White and Wiltshire.*

The one justifies by a Sheriff's Warrant, and saith not *hic in Curia prolat.* it's good, because it appears by the Record that he returned the Warrant to the Sheriff, and so need not shew it. *1 Rolls Rep. Bateman's Case.*

Trespass against *Julian G. Widow*; hanging the Suit she takes *D. to Husband.* Judgment is given for *Julian G.* The Plaintiff reverseth the judgment by Writ of Error, and had a Warrant to take *Julian D.* It's a good Justification in *faux Imprisonment*; for *Persona denotatur per Recordum.* *2 Bulstr. 80, 81. Doyly and White.*

By Process out of other Courts.

The Defendant justifies by Process to the Bailiff out of the Court of the Honour of *P.* and doth not shew any Process was return'd, which being an immediate Officer ought to be shewed; *contra* of an under Officer. *2 Keb. 156. Haywood and Wood.*

Process out of a Court *Virtute Literarum Patentium* is good in Justification. But in a *Quo Warranto* or any Action for the Court, they must be set forth: and in Actions between Parties where

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where there is no question of the Jurisdiction, they need not set them forth. 2 Keb. 104, 156. but it must be specially pleaded that such a Court was granted, and that *Virtute cuius, &c.* 156.

In *faux Imprisonment*, the Defendant (Warden of the Fleet) justified by Virtue of an Order of Chancery, that he should be committed to the Fleet. It's an ill Plea, because an Order is not sufficient; it ought to have been an Attachment. He should have pleaded, *Quoddam Breve de Attachiamiento*. Mod. Rep. 272. 2 Sanders 182. Furlong and Bray. contra 2 Rolls Abr. 559. Taylor and Bele.

Trespas of Battery and *faux Imprisonment* until he paid 28 l. The Defendant, as to all besides the *faux Imprisonment*, pleads Not Guilty; and as to that he pleads, he was Steward of the Stannaries, &c. and commanded the Officer of the Court to take him until he paid the 28 l. Per Cur. this is not repugnant in it self: for an Answer to the Imprisonment is an Answer to the Money paid. 1 Rolls Rep. 264. Eveley and Sloley, vide 1 Keb. 205. Cramp. and How cited in Prideaux Case.

In Assault, Battery and *faux Imprisonment*, the Defendant justifies on *non emittas* out of C. B. directed to the Sheriff of L. returnable Oct. Pur. and his Bailiff arrested the Defendant the tenth day of Febr. which was the day after the Efloyn-day, but before the *quarto die post*. Per Cur. after the Day of Return the Sheriff cannot execute it, but on the Return Day he may. Judgment pro Quer. 1 Keb. 805. Ellis and Jackson.

The Defendant justifies by Force of a Process out of the Palace Court, (*viz.*) That a Plaint in Nature of an Action on the Case was entred there against the Plaintiff, and that Summons was against him, and after that a *Capias*, by Force of which he

he was imprifored. It's an ill Plea. *Siderfin* p. 248, 259. *Rogers and Marshall*.

Note, Judgment is vacated; yet the Officer is excufed for executing the Writ, the Party not. The Cafe was:

A Man had a Judgment and Execution executed; and after the Judgment was vacated for being unduly obtained, and Reftitution awarded. And after the Defendant brought Trespafs againft the Plaintiff in the firft Action for taking the Goods, and adjudged it well lies againft the Party; for by the vacating of the Judgment, this is as if it had never been, and not like a Judgment reverfed by Error. And note, this Action was againft the Party, and not againft the Sheriff, who had the King's Writ to warrant him, which is fufficient for him. For in Trespafs or *faux Imprifonment* it fufficeth the Sheriff to plead the Writ only; but the Party ought to plead not only the Writ, but the Judgment alfo. But *Twifden* faid he was not fatisfied with this Judgment when it was given in the time of *Glyn* Chief Juftice; neither yet is for to make a Man a Trespaffor by Relation; for when the Execution was ferved there was a Judgment, although that after the Execution was vacated. 1 *Levinz*. 95. *Turner and Falgate's Cafe*.

Trespafs and *faux Imprifonment*. The Defendant juftifies by Warrant out of the Court of the Admiralty, which recites a Cafe depending in the Court of Admiralty *de re Maritima*, commanding the Defendant, their Officer to take the Plaintiff, upon which he took him. It was faid the Plea was ill, not averring that the Cafe was Maritime, fo that it might be tried if it were fo or not; and if it be not within their Conufance, their Warrant cannot juftify the Officer. But by *Hale* and *Cur.* it will be too hard to put the Officer in fuch a cafe to fhew the Cafe to be within the Jurisdiction.

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jurisdiction of the Court; it is sufficient for him to plead the Warrant, which he is bound to obey; and in this Case it doth not appear but that the Cause was within the Jurisdiction of the Court, 2 *Levinz* 231. *Otto* and *Selwin*.

Trespafs of Assault and Imprisonment. The Defendant pleads, that 26 *Febr.* in the Palace one levies a Plaint against the Plaintiff, and the Defendant (as Serjeant of the said Court) takes him by Virtue of Process upon this Plaint. The Plaintiff demurs. Argued *pro Quer.*

1. It doth not say that the Palace-Court is by Prescription or Letters Patents.

2. It's said that C. levied a Plaint in the Nature of an Action on the Case, and upon this a *Capias* issued, and the Officer returned it: The immediate Process here is Attachment by the Goods, where it ought to be a Summons. *Resp.* 1. It's a Court of Record, which ought to have such Process. 2. Summons doth not lie in an Action on the Case, but a *Capias* lies in Trespafs in any Case, and it's a general Entry in all Courts. 3. Summons is not a Process in an Action on the Case, but a *Pone*.

3. A *Capias* lies not in an Inferior Jurisdiction.

Resp. Admit this Process does not lie in an Inferior Court; yet the Court having Jurisdiction, the Officer is not to be punished.

Twisden. This is cured by Appearance.

Windham. It seems Process in an Action on the Case was a *Capias Infinite*.

Judgment *pro Def.* *Raym.* 129. *Rogers* and *Mascall*.

In Assault, Battery and *faux Imprisonment*: As to the Imprisonment he justifies by a Process out of an Inferior Court; and upon a Demurrer these Exceptions were taken to his Plea:

1. The Defendant hath set forth a Precept directed *Servienti ad Clavam*, and it is not said *Ministro Curie*.

Resp. A Precept may be directed to a private Person, and therefore *Servienti ad Clavam* is good enough.

2. It was to take the Plaintiff and have him *ad proximam Curiam*, it should have been on a day certain, as *Cro. Jac. 571*.

Resp. It's well enough; and how can it be on a day certain, when the Judge may adjourn the Court *de die in diem*?

3. It's not said *ad respond' alicui*.

Resp. Yet good enough, though not so formal.

4. It's not said the Action arose *infra Burg*.

Resp. The Defendant sets forth, That he did enter his Plaint *secundum Consuetudinem Curie Burgi*; and when the Plaintiff declared there, he shewed that the Cause did arise *infra Jurisdictionem*.

5. The Precept is not alledged to be returned by the Officer.

Resp. The Officer is not punishable, though he do not return the Writ.

The Court held the Plea to be good *in omnibus. 2 Mod. 58. Crowder and Goodwin.*

Trespas for Assault, Wounding, Taking and Imprisonment. *Quoad* the Assault and Wounding the Defendant pleads *Non Culp*. *Quoad* the Taking and Imprisonment he justifies by Warrant; and because he doth not justify the Assault in the taking, it's a Discontinuance. *2 Bulstr. 335. Wilson and Dodd.*

Per Stat. 7 Jac. c. 5. if any Action on the Case, Trespas, &c. shall be brought against any Justices of the Peace, Mayors, Bailiffs of Cities or Towns Corporate, Constaibles, &c. or any their Assistants for or concerning any Matter or Thing by

by them done by Virtue of their Offices, it shall be lawful for every Person and Persons aforesaid to plead the General Issue, and to give the Special Matter in Evidence.

An Action was brought, for that the Plaintiff being a Freeman, who had a Voice in the Election of a Mayor, the Defendant (being the present Mayor) refused to admit his Voice; and upon Issue and Trial the Plaintiff was Nonsuit, but the Roll not marked for double Costs. The Statute gives double Costs where the Officer is sued for Matter in doing his Office; here the Suit is for Nonfance. *Cur.* This Case is not within the Intent of the Statute, the Scope of which was where the Mayor, &c. were sued for *faux Imprisonment*, or such Matters where they ought to justify, it gives Liberty to them to plead the General Issue, and double Costs. 2 *Levinz* 250. *Herring and Finch.*

Justification by Custom.

In *faux Imprisonment* the Defendant justifies by a Custom of *London* of the Court of *Orphans*, that if an Orphan be taken out of Custody, to imprison the Party till he shall produce the Orphan, or be delivered by course of Law, and good. *Siderf. p. 17 Car. 2. B. R. Wilkinson and Bolton. Vide 1 Levinz 162. mesme Case.*

It was objected that the Plea was not good, to take a Man without notice of his Crime, and to bring him to the Court, and immediately to commit him; he ought to have notice for what he was brought to Court, so that he might be prepared to answer. But *per Cur.* this pleading that he had committed the Offence, and was convicted for it, and the Matter is Criminal, for which any Justice of Peace may commit.

Imprison-

Imprisonment justifiable by others not being Officers.

A Man may imprison another to prevent apparent Mischief which may ensue; as a Feme Covert who is mad, and would kill one, or burn an House.

If a Man see two Men fighting, so that one is in danger to be killed by the other, it's lawful for him to part them, and put them into an House until the Fury be past: but he may not justify it if there be only Words. 2 *Rolls Abr.* p. 559.

If a Man be wounded and like to die, any Man may arrest him that gave this Wound, and he may be kept a Prisoner till it be seen that the Danger is past. 16 *H.* 7. 38.

Justification by a Governor of an Island.

Trespafs of Assault, Battery and Imprisonment. The Defendant justifies as Deputy-Governor to Sir *W. Godolphin* in the Isle of *Scilly*, and pleads the Isle is an ancient Isle, and that within it time out of Memory, &c. was a Castle, and there was a Governor and a Deputy-Governor of the Castle, and Ministers and Soldiers attending for the Defence of the Isle, which receive Wages of the King, and have been under the Government and Punishment of the Governor, or (in his Absence) of his Deputy, for Offences in their Duty; and a Custom, That if any Minister or Soldier shall refuse to observe his Duty, and personally appearing before the Governor, or Deputy-Governor, and required to render his Obedience shall obstinately refuse to do it, or give opprobrious Words, &c. then they used to chastise them by Imprisonment by a reasonable time; and shews the Plaintiff's

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tiff's Disobedience and contumelious Words, whereby he imprisoned him. The Plaintiff demurs generally, and Judgment for him. Sir T. Jones 147. *Ekins and Newman.*

Pleading of the Statute of Limitations in Assault, Battery and Imprisonment.

Prideaux and Webber.

Trespas for Assault, Battery and Imprisonment *1 May 1657.* The Defendant pleads, That *Transgressio Insultum & Imprisonamentum præd* were made the 24th of October 1655. and pleads the Statute of Limitations. The Plaintiff replies, That certain Rebels (not naming them) had usurped the Government, and none of the King's Courts were open. The Defendant rejoins and confesseth the Usurpation; and further pleads the Act of Pardon of all things, and Acts of Hostility made under the Usurped Authorities; and further pleads the Act for Confirmation of all Judicial Proceedings in the late Times; and further pleads a Warrant to imprison him, *& hoc paratus, &c.* The Plaintiff demurs.

1. It was argued for the Plaintiff, That the Plea in Bar was ill, not answering to the Battery. But it was answered and resolved by the Court, That *Transgressio præd.* is an Answer to all.

2. It was resolved that the Statute of Limitations was a Bar, though it be (as it was pleaded) that the Courts were not open; because there was not any Exception in the Act of such a Case; and Infants had been bound if they had not been excepted.

Obj. The Rejoinder was multifarious and impertinent, in pleading the two Statutes and in not concluding upon the Statutes, *prout patet per Recordum.*

cordum. But *per Cur.* the Bar being good, and the Replication being insufficient, it is not material what the Rejoinder is, And Judgment for the Defendant. 1 *Levinz* 31.

C A P. X.

Of Torts to Chattels Reals and Personals, De Averijs in General and in Particular, Tort to Goods, with Presidents of Declarations, and Rules of Pleading.

Tort al Chattels, or of *Trespases done to Chattels Reals.*

TRespass for taking his Son and Heir and Marrying him, and the Declaration. 2 *Inst.* 440. *Stiles Rep.* 235. *Wood's Case.* N. B. 90. H. 3 *Rep.* 38. 39. 6 *Rep.* 22. 7 *Rep.* 12.

For taking away the Wife *cum bonis Viri.* *vide supra.* and *Dier* 256. *Tompson* 294.

One may have this Action for taking away his Servant. *Dier* 256. *Pl.* 10. 2 *Rolls Abr.* 556. 11, 12. *Winch.* p. 51.

As to the Battery of a Servant *vide prius.*

For taking away one's Apprentice the Action lies, 11 B. 91. I. 8 H. 6. 28. *vide supra.*

Trespass lies by a Goaler for taking away his Prisoner. *Stiles Rep.* 99, 100. *Reg. Orig.* 104. And likewise the Party at whose Suit he is arrested. *Stiles* 44. 342. because after he is arrested he hath an Interest in the Body of the Party. *Stiles* p. 342. *Gough* and *Cann.*

K

Trespass

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Trespafs for taking away his Captive from him. *Reg. Orig.* 95. a. 102. b.

The Defendant rescued the Party out of Execution, the Action may be brought at the Suit of the Party who had the Damage, or by the Sheriff. *Hetly* p. 98. *Congham's Case*.

In an Action of Trespafs *quare Clausum fregit, & solum & fundum* (viz.) *duas acras terræ fod. subvert. & asportavit.* Verdict *pro Quer.* It was moved in arrest of Judgment, That the Declaration was insufficient as to the Digging and carrying away the Soil; for *duas acras terræ* doth not express the Quantity of the Earth, but the Measure and Extent of the Ground where the Digging was. And Judgment was stayed. 2 *Ventr.* 174. *Higham and Darby*.

Trespafs lies for Marriage of a Woman by Force and Dureffe. *Affize Long* 5 *Ed.* 4. 61. b.

De insultu & minatione cujusdam R. P. & filii & servien. per quod servitium amisit. Bar *quod præd. R. P. cepit juvencum Def. & fecit Assault super Def.* *Tomp.* 389, 390.

Terts to Chattels Personals, and of Declarations thereupon.

De Averijs in General.

In Trespafs for driving Cattle to Places unknown, whereby the Plaintiff lost them. The Declaration is ill; because by this the Plaintiff shall have Damages as well for the chasing as the driving whereby he lost them; which may not be as to the Damages for the losing. *Siderf.* p. 295. *Cooper and Cottabed*.

A Man may not be guilty of Trespafs with Cattle, unless that they are his proper Cattle, or that he actually put them into the Place where,
&c.

Ec. 1 Sanders p. 27. Earl of Manchester verſus Vale.

Trespafs for Chafing ſo that one of the Beaſts died. The Defendant juſtified by *leviter* driving them to the Pound; he muſt traverse *absque hoc*, that one of them died of the Chafing. *Coply* and *Ferrer's Caſe* cited, 2 *Keb.* 601. *Leech* and *Midgly.*

De Averijs interfect. Townſ. 272, 273.

De Averijs in Particular.

De libero Tauro abduct. Reg. Orig. 109.

De Equo vel Vacca interfect. Reg. 109.

Trespafs for that *apud E. in Com. K.* he killed his Dog, being a Maſtiff Dog. The Defendant pleads, That Sir *F. W.* was ſeized of a Warren in Fee in *D.* within the ſame County, whereof he is and then was Warrener, and that his Dog was divers times killing Coneys there; and therefore he finding him there *tempore quo, &c.* running at Coneys, he Killed him: *absque hoc, &c.* that he is guilty *apud E. prout, &c.* It's a good Juſtification, and the Traverse is good, the Cauſe of Juſtification being local, and ſo he need not traverse all other places. *Cro. Jac. p. 44. Wadburſt* and *Dance.*

Trespafs for taking away his Maſtiff; but it ſhall not be ſaid *Pretij* or *ad valentiam.* 7 *Rep.* 18. 12 *H. 8.* 3. *Reg.* 109.

De Cane vocat a Bloodhound, *abduct.* *Kit.* 225.

Narr' par peircement d'un Chein avec un coſteau per que il moruſt. 1 *Sanders* 82.

Trespafs for the taking away a Greyhound with a Collar. The Defendant ſaith, The Dog was courſing an Hare in his Land. An idle Plea.

K 2

Cro.

The Law of Trespas.

Cro. Jac. 463. Atbell and Corbett. Trover lies not in this Case.

Pro duobus Canibus abduct' & interfect'. Justif. virtute Warr' Justice del Pace pro captione Canum pradiet'. Repl. De Injuria sua propria absque tali causa. Tomp. fo. 359.

Trespas quare vi & armis cepit & abduxit quendam Canem venaticum pretij. *Hob. p. 283. Edwards versus Engleton.*

If a Dog chase and kill the Beasts without my Incitation, in Trespas I may plead Not Guilty. *Dier fo. 29. Pl. 195. 2 Car. p. B. N. Millen and Fawdry.*

Trespas quare two Dogs, called Greyhounds, ipsius le Plaintiff, cepit & interfecit. The Defendant justified, For that the Greyhounds chased a Doe in his Park, and there killed him, for which, to prevent him for doing further Mischief, he killed him. The Plaintiff replies, The Doe was out of the Park in the Land of the Plaintiff feeding, by which he set on the Greyhounds to chase her out of his Land, and that they pursued the Doe into the Park, and there killed her. Upon which the Defendant demurs. *Per Cur.* the Replication is ill, because he doth not say he did his endeavour to stop the Greyhounds at the side of the Park, and hinder them from entering into the Park. *3 Levinz 28. Barrington and Turner.*

De Cane ad mordend' Oves consuet. Vid. infra. Et ad mordend' homines, &c.

Justification by the Plaintiff's own Carelesness. *2 Brown. p. 175.*

Trespas for killing a Mastiff Dog. Plead, The Dog was not muzzled, and ran violently on the Dog of B. and he, as Servant of B. killed the Dog. Ill Plea, because he saith not he could not otherwise prevent it. *1 Sanders 84. Wright and Ramscott. Siderfin p. 336. mesme Case. In 1 Levinz*

vinz 216. is the same Cafe. He faith the Plea was adjudged ill, not only for the Reason in *Sanders*, a Mastiff being valuable. But 2. It doth not appear that the Plaintiff's Dog was used to bite, nor that the Defendant's Dog was a Mastiff.

Declaration was, *Quendam canem ad mordend' oves consuet'*, &c. *scienter retinuit*: and not good. He ought to say, *Quod sciens canem, &c. scienter retinuit*: For it may be, *scienter retinuit canem*, and yet knew not that he was *consuet' ad mordend' oves*. *Cro. Car.* 487. *Kinman and Davis*.

A Man hath not an absolute Property in Beasts ^{Beasts in Parks} *feræ naturæ*: he may have Property qualified in and Warrens. them so long as they remain tame, and Property possessory they may have *ratione impotentiae & loci*; as young Goshawks which air in my Land, I shall have a Property possessory in them, and if any take them the Owner shall have Trespafs. 7 *Rep.* 17. b. Cafe of Swans. 3 *Leon.* 219. *Ireland's Cafe.* 2 *Leon.* 201, 201.

But when one had Beasts Salvages *ratione privilegi*, as by reason of a Park, Warren, &c. he hath not Property in the Deer, Coneys, Pheasants or Partridges. *Ergo*, if one bring an Action of Trespafs *quare Parcum suum fregit, &c. & tres Damas, Lepores cepit, &c.* he shall not say *suos*. *Ra. Entr.* 650. 3 *Br.* 479. *Townsend* 269. col. 1. *Cro. Car.* 554. *Child's Cafe*. And yet for Deer in a Park, Coneys in a Warren, the Owner hath special Property in them as long as they are in the Park or Warren. So of Doves in a Dove-Coat. But for Deer or Coneys, if they be not in a Park or Warren, he may not say *suos*, unless he add that they were Domestick. *Vide* 7. *Rep.* 17. b. *N. B.* 86. 2 *Leon.* 201.

The Law of Trespas.

If a Keeper follow a Buck which is chased out of the Park, although he who hunteth him killeth the Buck in his own Ground, yet the Keeper may enter into the Ground and seize the Deer, because the Property and Possession of the Deer is yet in him by Pursuit. 12 H. 8. Reg. 102.

An Action was brought *quare ducent' Cuniculos suos, pretij, &c. cepit*. But then they were in the Warren.

A Commoner cannot destroy and kill Coneys on his Land. 2 Leon. 201. 202. Cro. Eliz. 242. Barret's Case.

If Coneys go out of the Warren, any Man may kill them on his own Land. 5 Rep. 104.

Trespas for entring and breaking his Close, and fishing in *seperali Piscaria sua*, and for taking *Pisces suos, ibid. videl.* 100 Eels; to say *Pisces suos* is good, because they were in *seperali Piscaria*. Cro, Car. 553. Child and Greenhill.

Birds.

De Columbis capt. cum Retibus. Reg. 96, 106. 1 Br. 166.

De cato project. in Columbare, &c. Reg. 106.

De Volucris capt. 140 Reg.

For taking away young Goshawks Trespas lies, for he had Property possessory. So if Hawks are reclaimed. 7 Rep. 17. b. Reg. Orig. 93, 96. N. B. 89. K.

De Clauso fracto & Phasianis capt. 1 Br. 67.

Trespas for striking and killing an Hawk, and saith not that she was reclaimed, yet good. *Aliter in Trover*. Cro. Car. 18. Vincent and Lesney. Dier 14 Eliz. Spencer and Fines.

Trespas lies for killing Pidgeons in a Dove-House. And *per Mountague*, for killing them out of the Soil of the Owner. The Writ shall say, *Columbas suas*. 2 Rolls Rep. p. 32.

Tort

Tort al (biens) to Goods.

In Trespafs for Goods the Declaration ought to lay the Property of the Goods in the Plaintiff at the time of the taking: *As ipsius quer.. 3 Bulstr. 303. Whiteman's Case.*

For dead things it shall be *bona & catalla ad valenciam*; but if it be for one thing it shall not be said, *bona & catalla*; but you must name the thing it self, except *Fru mentum* and Wine. *Survey del Ley, 361, 362. 46 Ed. 3. 16. Pl. 12.*

If *A.* take away my Goods, and after *B.* takes them away from *A.* I may have Trespafs or Trover against one or the other at my Election, though the Opinion in *Croke* is, I shall not have Trespafs against *B.* *Siderfin 438. in Wilbrabam and Snow.*

De bonis capt. Ra. Entr. 615, 635, 663, 667, Capt. 676, 681. Reg. 108.

Goods stolen out of an Inn. *Dier p. 158. b.*

De bonis asportat. per Original in B. R. Justif. Asportat. per Distress pur Rent. Tomp. 357.

De Clauso fract. conculcatione & consumptione Herbæ pedis ambulando, ac de asportatione bonorum & catallorum. 2 Brown 252., 258, 271, 281.

Wool distreined until *C.* and *D.* bind themselves District' & are to make Delivery. Trespafs *vi & armis* lies, and restata. Value shewed. *43 Ed. 3. 6. Pl. 18.*

Fru mentum. The Writ was *bona & catalla*, Corn and Grain and good. *46 Ed. 3. 16. Pl. 12.*

Quare cepit quasdam Garbas Tritici. It's not good for the Uncertainty. *Survey de Ley, 363.*

Tithes.

De Bladis seperat' pro Decimis asport'. Co. Entr. 678, 686.

De Clauso fract. Herba conculat. alia Herba depast. & Feno pro Decimis exposit. dispers. super Herbam querentis. Hern. 725. Dier 36. Pl. 39.

Herriot.

For seizing an Herriot unjustly. Cro. Jac. 50.

Quare cepit & imparcavit averia carucæ, it may be *vi & armis*, and *contra formam Statuti* in general, is good enough; and he need not say that there is sufficient Distress *preter, &c.* for it shall come on the other part to shew that there was not. *Siderfin p. 348.*

Beasts of the Plow.

Trespas on Stat. 1 R. 3. c. 3. for taking the Plaintiff's Goods (being arrested for Suspicion of Felony) before Conviction, and declares of seizing a certain parcel of Money. Verdict *pro Quer.* It was moved in arrest of Judgment, because the Words of the Statute are, That none shall seize the Goods of any Person, and Money is not Goods. *Fitz Brief. 512.* But adjudged for the Plaintiff, and that Money is Goods. *Raym. 414. Osborne and Wandell.*

If a Man do voluntarily take away my Goods or Cattle, and keep them till I pay him Money, either without Colour or with Colour, as under Pretence that it is Herriot, Waif, Estray, when it is not so; and if he will not restore the thing taken till I give him Money or Bond, I shall have it all in Damages. *Brok. Tresp. 345.*

Writings.

Trespas *quare bona & catalla sua cepit (viz.) unum scriptum Obligatorium, in quo continetur quod J. S. teneatur al Plaintiff in 100 l.* He Declares of divers Goods and Chattels; and amongst others

others, of the taking of an Obligation. It's not good. For an Obligation, or the Value of this may not be demanded by the Name of *bona & catalla*; for by such general Name Obligation doth not pass. *Yelv. p. 68. Channel and Robotham.*

De Baga cum Chartis asportat. Ra. Entr. 616. In a Chest. 36 H. 6. 26. Ra. Entr. 7.

Pro Guardianis Ecclesie de Charta Annuitatis capt. lacerat. &c. Ra. Entr. 7.

Pro fractione Sigilli scripti Obligatorij. 1 Brown 367. Reg. 106.

Pro Dilaceratione scripti Obligatorij. 1 Brown 367. Tomps. 292. vid. Reg. 110, 106, 111. 92, 107.

C. C. seized of the Mannor of *East H.* enfeofs H. R. *Per Cur.* Indenture rend. 60*l.* at two Feasts, &c. C. C. by Indenture bargains and sells the 60*l.* to the Plaintiff for all his Estate, which was enrolled, by which he was seized of the Rent for the Life of C. C. and so seized lost the Part of the Indenture sealed by H. R. which came to the Defendant's Hands, who, *vi & armis*, teared the Seal off the said Indenture, *contra Pacem*. The Defendant pleads, C. C. *non concessit* the Manor of *East H.* to H. R. rendring the Rent, &c. *Modo & Forma*. The Plaintiff demurs. The Plea in bar is not good: For the Defendant destroys the Action of the Plaintiff but by Argument; and the Rent by this Action is not demanded, but Damages for tearing of the Indentures. But the Declaration is ill: 1. The Action is brought for tearing the Counterpart, by which the Rent was not created. 2. It's not averred that C. C. for whose Life the Rent was reserved, was living; and if he be dead, the Deed belongs to the Defendant as Heir of C. C. 3. The Plaintiff doth not shew any Possession in fact of the Deed, but only

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only by way of Argument, *i. e.* That he casually lost it. 4. The Counterpart whereof the Plaintiff complains, of the Plaintiff's own shewing, as well compriseth Warranty as Rent, and this doth not pass by the Law to the Plaintiff without special Gift thereof made by C. C. *Yelv. p. 223. Sutcliff versus Constable. Nota ceo case.*

Boards.

Quod fregit, &c. & asportavit his Boarcs. The Defendant justifies for that the Plaintiff had fixt them to his House so that he had Property in them 2 *Rolls Rep. 238.*

Cloaths.

For taking away two Trunks, and doth not say what Cloaths, and yet good. *Stiles 352. Web and Washborn.*

For breaking open two Chests, and taking away certain Cloaths and three Pounds in Money; and it appears not where the Cloaths were when they were taken, whether in the one Chest or in the other; and it was naught. *Stiles p. 43. Vincent's Case. Allen's Rep. mesme case.*

Beams and Weights.

Trespass for taking away Beam, Scales and Weights, and shews not what Weights; it's ill *Stiles Rep. 352. Web's Case.*

CAP.

C A P. XI.

*Of Torts done to Inheritance and Free-hold,
and what belongs thereunto.*

Torts to Inheritance, and other Things appurtenant.

I Shall first fet down some General Rules, and then go to Particulars.

The Plaintiff ought to shew the Village in which the Inheritance corporate lies, otherwise there can be no *Venus. Surv. Ley 349.*

If a Man enter into my House against my Will, this is a Trespafs although the Door be open. *2 Rolls Abr. 555.*

The Land of every Man is in Law enclosed from others, though it lie in the open Field, and the Writ shall be *quare Clausum fregit. Doct. and stud. cap. 8. lib. 1.*

Trespafs for entring into his Close such a day, and detaining Possession until the time of exhibiting this Bill, and alledgeth not any day when the Bill was exhibited. Verdict *pro Quer.* and moved in arrest, because the time of the Detainer ought to have appeared to the Jury, and the Course is to limit a time in the Declaration. *2 Rolls Rep. 135. Sliford and Goodwick.*

Trespafs for unearthing a Badger. The Defendant justifies, That a Vermin (called a Badger) was found there, *ad dampnum Inhabitantium*, by Reason whereof he uncoupled his Hounds in the Place where, &c. and hunted and found the Badger, and chased him until he Earthed him in the Place where, and thereupon digged the Ground and took the Badger and killed him, *quæ est ead⁹ Transf.*

The Law of Trespafs.

Transf. The Action well lies; for hunting is the ordinary Course, and the digging for him is unlawful. *Cro. Jac.* 321. *Gensh* and *Mynns*.

Trespafs for digging his Land and carrying away certain Loads of Earth, not shewing what kind of Soil it was; yet good: But it should have been of Soil *inde provenien*. *Stiles* p. 23. *Barrett's* Case, and p. 43.

If one make a Ditch, or raise a Bank to hinder my Way to my Common, I may justify the throwing of it down, and filling of it up. *Stiles* Rep. 470. *Williamson's* Case.

De Bladis & Herba.

Trespafs *quare Clausum fregit*, and threw down his Fences. The Defendant pleads Not Guilty to all but the breaking of the Fences; and for that he Justifies, For that he was possess of certain Corn in the Place where, as of his proper Goods, and made a Breach in the Fence as was necessary for the carrying of it away. The Plaintiff demurs specially, because he did not shew by what Title he was possess of the Corn. *Per Cur.* for this reason the Plea is insufficient. 1 *Ventr.* 221. *Petrot* and *Bridges*.

Patentee del Roy de Herbagio Forestæ, shall have Trespafs against any who consume or destroy the Grass, but not the Trees; and also shall take the Beasts there Damage-Fesant; and the Writ of Trespafs shall be *Quare Clausum fregit*. *Disr* 285. *Pl* 40.

The Plaintiff declares of eating his Grass *cum quibusdam averijs*, and doth not say what Beasts, and yet good after a Verdict, *per Roll*. This Action is brought for Damages: But where the thing it self is in demand, and an Action is brought for it

as

as in Trover, the thing ought to be particularly named. *Stiles* p. 170. *Brook* versus *Brook*.

For taking and eating his Grass *ad tunc & ibid. nuper crescen.* *Quære* if it be not contradictory. It should be *ad tunc & auxi nuper.* *Siderfin* p. 295. *Cooper's Case*.

Trespafs for driving Cattle over the Plaintiff's Ground. The Case was, *A.* hath a Way over *B.'s* Ground to *Blackacre*, and drives his Beasts over *B.'s* Ground to *Blackacre*, and then to another Ground beyond *Blackacre.* *Per Cur.* by this means the Defendant might purchase a thousand Acres adjoining to *Blackacre*, to which he prescribes to have a Way, and thereby the Plaintiff might lose the Benefit of his Land: And that a Prescription presupposed a Grant, and ought to be continued according to the Intent of its original Creation. *Mod. Rep.* 190. *Howell* versus *King.*

Trespafs by Executor *de bonis asportatis in vita Testatoris.* The Plaintiff declares, That the Defendant *blada crescentia* upon the Free-hold of the Testator, *messuit defalcavit cepit & asportavit.* *Per Cur.* it's but one entire Trespafs; the Declaration describes only the manner of taking it away. Had it been *quare clausum fregit & blada asportavit*, it had been naught; or if he had cut the Corn and let it lie, and then took it away, no Action would have lain for the Executor, for that had been Felony. 1 *Ventr.* 187. *Emerson's Case.*

Trespafs *quare vi & armis apud Manerium Toll-Booth. suum de H. erexit quoddam Velabrum (Anglice a Toll-Booth) & vi & armis cepit Tolnetum, &c.* and disturbed him in gathering Toll *ad feriam ipsius Quer. spectan.* *Per Cur.* it's good enough *vi & armis*, though it were no Breach of the Soil; neither need he make any special Title to the Fair, this being a possessory Action, and is a sufficient

ficient Possession against a Stranger; and the *vi & armis* he took Toll, is well enough. *Cro. Jac.* 122. *Dent and Oliver.*

Warren.

De libera Warrena fract. ac venatione inde & cuniculis occisis. Tompsl. 291, 293. vide supra cap. precedenti, & infra.

De Molendin. Piscbar. gurgit. & pontibus.

There be divers Forms of Writs for fishing in his Fischary; one is, *quare in vivariis suis piscatus fuit.* Another, *quare in seperali pisccharia ipsius A. piscatus fuit.* If a Man let out the Water to the end to take Fish, he is a Misfeasor within the Statute *W. 1. c. 20.* but not by carrying the Water away. Collateral Trespassee neither in Parks nor Fish-ponds, &c. are within this Act. If one hunt in a Park, or fish in a Pond, &c. though he kill no Deer, nor take any Fish, yet this is a Misfeasance within this Statute. *Co. 2 Inst. p. 200. versus Malefactores in Parcibus & Vivariis.* 1 *Browne* 368. *W. 1. c. 20. Dier* 238. a. 326. *Pl. 3.*

De seperali Pisccharia piscat. Ash. 440. *Dier* 267. *Pl. 14. Cro. Car. 554. Child's Case,* and the Declaration shall be *Pisces suos.*

Bar by Prescription. *Dier* 267.

Trespas for taking and cutting his Nets and Oars. The Defendant justifies, For that he was seized in Fee of a several Fischary, and that the Defendant, with divers others, endeavoured with their Oars to row upon his Water, and with the Nets to catch his Fish; and for the Safeguard of his Fishing, he took and cut the Nets and Oars. It's an ill Plea: for he cannot by such Colour cut the Nets and Oars; but he might have taken them

as

as Damage-Fefant, to ftop their further Fifhing.
Cro. Car. 228. Reynel and Champernoou.

*De clais & palis fixis in gurgite quer. retibus
pofit. & piscibus capt. Reg. 103, 109.*

De ponte fracto. Reg. 106.

*De fractione capt. & asport. ponti lignei quer. ex
transverso cujusdam foffat. in via pedestri pofit.*
1 Browne 361.

De Parcis & Warrenis.

For Chafing or Hunting in a Free Warren
Trespafs lies.

Trespafs lies at Common Law for breaking his
Park; but not for Savages taken, by the Statute.
2 *Rolls Abr.* 550.

A. had free Warren in the Soil of *B.* *A.* fhall
not have Action of Trespafs *vi & armis* versus *B.*
quare in libera warrena sua latibula ejusdem war-
renæ prostravit, per quod cuniculi de eadem war-
rena interier. but *A.* is put to his Action on the
Cafe againft the Owner of the Soil. 2 *Rolls Abr.*
550. Sir *William Mounfon's* Cafe.

Trespafs *quare claufum fregit, nec non liberam
warrenam* of the Plaintiff *intravit*, and killed and
carried away Coneys. The Defendant juftified
as a Commoner, and many of the Coneys being
on the Common Damage-Fefant, he entred and
chafed them out. *Per Cur.* ill Plea. The Com-
moner cannot kill the Lord's Coneys, nor meddle
with them: If the Lord furcharge the Common
by Reason of them, his Remedy is by Affize, or
Action on the Cafe. So long as the Coneys are
in the Lord's own Land the Lord hath a Property
in them, and he may fay *cuniculos fuos.* Now
when he fhews that this Intent was to enter and
chafe the Coneys, his Entry was tortious. *Cro.*
Fac. 145. Hoddefdon and Gryfell. Pafch. 44 Eliz.
Bollew

The Law of Trespafs.

Bellew and Langdon. Mich. 9 Car. 13. Sir Will. Mounson's Case.

The Defendant justifies Assault and Battery by a *molliter manus*, &c. to hinder him from taking the Coneys. *Cro. Eliz. p. 243. Barrett's Case.*

De clausura & obstructione viæ quam quer. habuit. 1 Browne 384.

De Arboribus.

If the Lessor cuts the Trees without Licence or Will of the Lessee, an Action of Trespafs by the Lessee lies against him. *Dier 90. b.*

If the Lessee cuts the Trees to repair the House, and after the Lessor takes them away, this Matter is not in bar of Waste, for that the Lessee may have an Action of Trespafs. *Dier 90. b.*

A Man gives to me all his Trees growing in his Close, and notwithstanding this he cuts them down himself, and presently I take them and carry them away, and he brings Trespafs against me *quare vi & armis arbores suas succid. cep. & asport.* I may plead as to the cutting down, Not Guilty, and justify for the residue. *Dier 305. Pl. 37.*

Trespafs *vi & armis* doth not lie against Lessee for Years, who cuts the Timber-Trees down, and sells them; but if he cuts them down and lets them lie, and after carries them away, so that there is some time for the distinct Property of a divided Chattel to settle in the Lessor, then the Action lies. *Allen p. 82, 83. in Udall's Case.*

Vide plus postea, Bar de Arboribus.

The Lessor excepts the Trees in his Lease; he may have this Action *quare clausum fregit* for Trespafs done in them. *Dier 19. 8 Rep. 63.*

*

Several

Several Trespas.

De clauso fract. ac bladis ac herba depast. Ra.
Entr. 662.

*De clauso fract. herba conculcat. januis &
sepibus prostrat. & bonis capt. Coke's Entries,*
651.

*De clauso fracto, herba conculcat. januis &
sepibus prostrat. & bonis capt. Coke's Entries,*
651.

L

C A P.

C A P. XII:

Of the Common Bar, Novel Assignment and Colour of Bars in Trespafs.

Le Common Bar, the Reason of it.

Common Bar, *un Close de pasture nosme Stubbs; Novel Assignment de 2 pieces de Terre en B. Winch. p. 1085.*

In Trespafs *quare clausum fregit*, if the Plaintiff do not in his Declaration shew a Place where the Trespafs was done by Name or Abuttals, then the Defendant by Plea pretends a wrong Place, where be sure the Plaintiff hath no Title; which is called the Common Bar, which forceth the Plaintiff to assign a Place, which is called in pleading, the New Assignment.

Trespafs *quare clausum fregit apud S.* for digging his Soil. The Defendant pleads, That the Place where is two Acres of Land called *Blackacre*, which is his Free-hold, and so justifies. The Plaintiff saith that the Place called *Blackacre* is his Free-hold, *absque hoc* that it is the Free-hold of the Defendant. Demur, because it is but a Common Bar, or as it is commonly called, a Blank Bar, and it is only pleaded to enforce the Plaintiff to assign his Trespafs in a Place certain, the Declaration being general, and therefore the Bar not traversable. *Quare Cro. Jac. p. 594. Rickman and Cox.*

As for Presidents of Common Bars, *vid. Towns- end's Tables, 275.*

*Of the Novel Assignment, and the Nature
and Reason of it.*

Usually after the Common Bar hath been pleaded in an Action of Trespafs, there is a new Assignment of the Place, and then the Pleading is in Justification, or other special Plea, or Not Guilty to the new Assignment.

This new Assignment is often used to clear a Title which upon it comes in Question.

A New Assignment is in the Nature of a Replication; and it is used for the better setting down and ascertaining of the Time and Place, &c. which was not well assigned before, but generally in the Declaration. As the Plaintiff declares in Trespafs for breaking his Close, cutting down Grass, &c. in such a Parish and County. The Defendant pleads and says, That the Place where, &c. are ten Acres of, &c. and are his own Freehold, *per quod* he entred, &c. as into his Freehold, &c. Then the Plaintiff says or replies, The Close and Place where, &c. are twenty Acres of, &c. lying in the Parish of, &c. and called and known by the Name of, &c. other than the said Acres mentioned in the Defendant's Plea; and for that the Defendant hath not answered to the Trespafs in the twenty Acres newly assigned, the Plaintiff *pet. Judgment*, &c. to this new Assignment the Defendant must plead, if he hath any thing in Bar thereof. *Brook Tit. Tresp. 212.*

In Trespafs the Plaintiff may assign his Trespafs only in one Town, and if he do assign a Place, the Defendant may plead at another Place without traversing the Place assigned by the Plaintiff; and then the Plaintiff may take a new Assignment. But in Replevin you must assign a Place as well as a Town; and in such Case, the Place as well

The Law of Trespas.

as the Village are traverſable by the Avowant. *Hob. p. 16. Read verſus Hawk.*

In *quare clauſum fregit, &c.* the Defendant juſtifies, That the Cattle went in through the defect of the Plaintiff's Incloſures. The Plaintiff replies, That the Cattle came in through another Man's Fence into his Ground. The Defendant demurs, for that the Plaintiff doth not aſſign where the Place of the other Cloſe lies, through which the Cattle came. *Windham.* Here is a new Aſſignment, and he answers not the Trespas for which the Action is brought, and a new Aſſignment muſt have a new Answer. *Stiles p. 357. Baker and Andrews. Rolls contra.*

The new Aſſignment in this Action is parcel of the Count, and ſhall abate the Writ if it be ill. *I Anderson 31.*

The Defendant pleadeth, That the Place where, &c. is called *Whiteacre*, &c. and that it is his Free hold. The Plaintiff replieth, That the Place where is called *Blackacre*, *alius quam in barra.* The Defendant rejoins, That the Acre mentioned in the Bar, and the Acre mentioned in the Replication are one and not divers. It's no Plea: For it is repugnant to ſay that they are both one, when the Plaintiff by his Replication hath affirmed upon Record that it is another. When he ſaith *alius* it cannot be *idem.* *Cro. Eliz. p. 355. Freeſton's Caſe.* The Caſe of *21 H. 6. 21.* is no Law. The Defendant ſhould have pleaded in bar to the Place newly aſſigned, or Not Guilty. *Ibid. p. 492.* For when the Plaintiff makes a new Aſſignment, this is a Waiver of any Trespas alledged in the Bar. By the new Aſſignment the Bar is out of Doors, as if it never had been pleaded. Therefore where the Defendant juſtifies for Damage-Feeſant in *Blackacre*; The Plaintiff made a new Aſſignment of the Trespas in *Whiteacre.* The Defendant

Defendant justifies as seizure for an Herriot: yet good, though in Bar he justifies for Damage-Fellant, wherein he claims not any Property; and in the Rejoinder he justifies for a Herriot. *Cro. Eliz. p. 589. Odibam and Smith.*

Trespafs quare *domum & clausum fregit*. The Defendant pleads, The House is called *Crable-House*, and one of the Clofes is *Blackacre*, and the other is *Whiteacre*, and pleads that they are his Free-hold, and so justifies. The Plaintiff saith, That the Trespafs done was in the House called *Crable-House*, and in *Blackacre*, which are his Free-hold, *absque hoc* that they are the Free-hold of the Defendant; and that the Trespafs was done in another Place containing twenty Acres *alias quam Whiteacre*, &c. Demurrer; for it was said, when the Plaintiff makes a new Assignment, so that the Defendant hath not agreed to him, and hit every Parcel intended in the Declaration, this new Assignment is as a new Declaration, to which the Defendant shall have a new Answer in all, and is a Waiver of the former Pleading in all; wherefore he ought to have omitted his Traverse. But *per Cur.* in regard the Defendant hath hit some of the Places wherein the Plaintiff intended the Trespafs, and pleaded thereto, the Plaintiff may well answer to that part, and the Defendant shall have no other answer. As if the Defendant had hit one Place, and had confessed the Action therein, the Plaintiff needed not make any Answer thereto, and the Defendant shall not wave his Answer, and answer to all *de novo*. *Cro. Eliz. p. 812. Prettyman and Lawrence.*

The Plaintiff in Trespafs makes a new Assignment, the Defendant may not take Issue on the Place newly assigned being *una & ead.* but he shall plead to the Trespafs. *More No. 641.*

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If the Plaintiff makes a new Assignment, the Defendant shall make a new Justification if he will. *More No. 713. in the Case of Odiam and Smith. Vide ante.*

If a Declaration be general, *quare clausum fregit*, and doth not express what Close, there the Defendant may mention the Trespas at another day, and put the Plaintiff to a new Assignment: But if he say, *quare clausum vocat Dale fregit, &c.* there the Conclusion *quæ est ead. transgressio* will not help. *Mod. Rep. 89.*

Though the new Assignment is more large than the Declaration, yet it's good. For in Trespas Damages only are to be recovered. *Aliter in Ejectment. Winch Rep. 65. Avis and Fenney.*

Where the Plaintiff ought to make a new Assignment, and what shall be a good Assignment and what not.

Until the Defendant gives a Name to the Place where the Trespas was done, the Plaintiff need not alledge a new Assignment. *Dier 23. Pl. 147.* Inasmuch as the Defendant hath not varied from the Meaning of the Plaintiff, if he doth not give a Name certain to the six Acres, as to say the Place where, &c. is six Acres in D. called *Green-Mead. &c.*

If the Plaintiff in New Assignment gives a special Name to the Place, and also assigns Buttralls, he ought to prove both. *Dier 161. Pl. 46. Sanders's Case.*

The new Assignment in Trespas was, *quod clausum fregit in una acra terræ siue Prati jacent in quodam Campo vocat, &c.* The Defendant pleads *Non Culp.* It is naught for the Uncertainty. For the uncertainty of Land or Meadow, and being without any Buttralls or Name of the Acre,

the Plaintiff was Nonsuit. *Dier* 264. *Pl.* 39. *And.* 2 p. 103. 2 *Cro.* 594. 3 *Cro.* 355, 492.

Trespafs in Domo. The new Assignment may be in a Stable or Barn: But if the Declaration had been of a Close, and the new Assignment of a Barn, it had not been good. 2 *Leon.* 184, 185: *Hore* and *Wridleworth.* The Assignment ought to be warranted by the Declaration, and so doth this; for *Domus est nomen collectivum*, and contains many Buildings, Barns, &c.

Trespafs quare averia sua cepit apud Kymb. and chased them, &c. The Defendant justifies in such a Close for Damage-Fesant. The Plaintiff shews, That the Place where was another Close, &c. and good: For the Plaintiff may make a new Assignment in this, as well as in a *quare clausum fregit.* *Cro. Jac.* 141. *Batt* versus *Bradly.*

Trespafs for breaking his Close. The Defendant saith the Trespafs was in six Acres of Land in *D.* and that those six Acres were his Free-hold. The Plaintiff may reply it is his Free-hold, and not the Free-hold of the Defendant. If the Plaintiff had six Acres in *D.* and the Defendant had six Acres in *D.* the Defendant cannot give in Evidence that this Trespafs was done in his six Acres. *Dier* 23. *Pl.* 147. *Bro. Tresp.* 112. 27 *H.* 8. 7: But by his Plea it shall be intended that his Meaning refers to the six Acres of the Plaintiff, and not to his own Land.

In Trespafs for breaking his Close, the Defendant pleads a Bar at large to make the Plaintiff assign the Place in certain, &c. The Plaintiff thereupon alledgeth, That the Place where he complaineth is such, &c. and shews in certain, another than that wherein the Defendant justifies. The Defendant averrs, That the one and the other are all one, and known by one Name and the other. The Plaintiff demurs. Judgment *pro Quer.* Be-

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cause that upon such special Assignment it shall be taken meerly another than that in which the Defendant justifies, insomuch as the Plaintiff in such a Case cannot maintain it upon his Evidence given: If the Defendant had pleaded Not Guilty to this new Assignment, that the Trespafs was done in the Place in which the Defendant justifies, although it be known by the one Name and the other, and that the Plaintiff hath good Title to it, because that by his special Assignment, saying, That it is another than that in which the Defendant justifies, he shall never after say that it is the same in this Plea; for it is meerly contrary to his special Assignment. *Popham's Rep.* 109. *Fennor's Case.*

In the new Assignment the Place assigned is not traversable. *Hob.* 16.

In the new Assignment he alledged the Trespafs to be in an House called the Kitchen, and in his Garden, and in one Close called the Court. The Defendant, as to the Force, &c. and all besides the Intration, pleads Not Guilty. And as to his Entry into the Court, and Kitchen, and Tenements aforesaid of the new Assignment, he pleads, &c. This is good enough, though he hath not pleaded to all the Closes; for he hath justified in the Tenements aforesaid of the new Assignment. *Hutton p.* 127. *Lashbrook's Case.*

The Plaintiff supposed the Trespafs to be done in the breaking of his House and Close in such a Town. The Defendant justifies in an House and Close in the same Town, and shews which, to put the Plaintiff to his new Assignment: to which the Plaintiff replied, That the House and Close of which he complains is such an House, and gives it a special Name. The Defendant demurs, and adjudged against the Plaintiff, For by the Bar the Plaintiff is bound to make a special Demonstration in what Messuage and what Close. *Popham p.* 109.

Pr. fidei.

Presidents of new Assignments and Pleadings.

De Messuag. De Messuag. & Terris. 2 Rep.
5, 6, 18. Co. Entr. 272.

De uno Curtelag. 3 Br. 474.

De pecia Terræ vocat. Co. Entr.
648.

Common Bar in two Acres *vocat. Blackacre.*
New 2 Rep. 6. a.

Assignment 7 Selions *del terre in Southfield.*
Winch. Entr. 1076.

Novel Assignment, un peice de terre nosme
Housecorner in B. parva gisant en Trenilborough-
Field, cont. nine Acres. *Winch Entr. p.* 1080.

Non culp. ad partem; Common Bar ad residue,
& nova assignatio inde. 3 Br. 400, 474.

Nova assignatio post placitum speciale ad totum,
&c. & non culp. ad novam assignat. Ra. Entr.
579, 626, 641.

Def. in placito ad novam assignat. dicit quod lo-
cus vocatur tam per unum nomen quam per aliud
jacen. in K. pred. 3 Br. 418.

Pur mease debruse, le common bar, un mese
nosme le Swann in Cornhill. Novel Assignment
un mease nosme le Dog & Duck in Cornhill. *Winch.*
Entr. p. 1096.

Non culp. al novel Assignment. Ra. Entr. 632.
Co. Entr. 289.

Bar special al novel Assignment. Ra. Entr. 608.
Hern. 707.

Colour al novel Assignment. 1 Browne p. 380.

Judicium pro Quer. in parte loci de novo Assign.
ubi Def. est inventus non culp. al residue. Jud. 163.
132.

Bar to the new Assignment must be either Not
Guilty, or specially.

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Loci in quibus in Bars, Replic. & Abuttals.

——— *Pecia terræ vocat. a Wharf, continens tot Pedes in longitudine, & tot in latitudine. Ra. Entr. 661.*

Plowd. Com. 21. Colthirst and Bejushin.

Vide plura as to this in Townsend's Tables.

Before I come to treat of Bars in Trespass in particular, it will be necessary to say something of Colour in Trespass, and unfold the Notion of it, and where it shall be given, and where not.

COLOUR.

Colour in pleading signifies in the Common Law a Probable Plea, but in Truth False; and is to the end to draw the Tryal of this Cause from the Jury to the Judges. *Terms del Ley, Bro. Tit. Colour. 64, 140.*

Want of Colour is but Form, and therefore must be alledged on Demurrer. 3 *Leon. p. 267.*

In Trespass *entre sur Disseisin, Affize, &c.* Colour ought to be given. Because the Law (which favours certainty) to the end that either the Court shall adjudge upon it if the Plaintiff demur, or that a certain issue may be taken upon a Point certain, requires the Defendant, when he pleads such special Plea, that this notwithstanding the Plaintiff may have Right, the Defendant shall give Colour to the Plaintiff, to the end that his Plea shall not amount to the general Issue, and so to leave all the matter at large to the Jurors, which would be full of Multiplicity. As

Affize is brought against *H. H.* (who was in-
fost by *J. S.*) if he be compelled to plead to the
point of the Affize, *i. e. nul tort, nul disseisin,*
there

there all the matter will be put in the Mouths of the *Lay-gents*. If *H. H.* plead in bar of the Affize, that *J. S.* was seized and infeofft him, by force of which he enter'd, and demand Judgment if the Affize lies against him. This Plea is not good, for it amounts to the general Issue. Therefore that the Matter may be pleaded before the Judges, or be upon a point certain, the usual way is, for the Defendant to give Colour (as the *Spaniard* saith, *Tell a Ly and find the Truth.*) And the most common Colour is this, When the Defendant pleads *J. S.* infeofft him, he pleads over and saith, and that the Plaintiff claiming by Colour of a Deed of Feofment made by the Feoffor before the Feofment made to him, where no Right passed by the Deed upon which he entered, &c. 10 Rep. 90. a. *Doct.* and *Stud. cap.* 53. fo. 160. 19 H. 6. 21. So

So in Action of Trespafs for taking away the Plaintiff's Beasts, the Defendant pleads, That before the Plaintiff had any thing in them, he himself was possessed of them as of his own proper Goods, and delivered them to *A. B.* to deliver to him again when, &c. and that *A. B.* gave them to the Plaintiff, and the Plaintiff supposing them to be *A. B.*'s took them of him as his Gift, and the Defendant took them from the Plaintiff, whereupon he hath brought the Action. It's a good Colour. *Doct.* and *Stud. l. 2. c. 43.* 10 Rep. *Dr. Leyfield's* Case.

In Trespafs, Colour of Possession given by the Defendant to the Plaintiff sufficeth; because the Declaration is general upon a Supposal without any Title put in Certain, and for this it sufficeth to answer a Supposal with a Colour of Possession only. But in Actions of Trover, and all other Actions where the Plaintiff makes Title to the thing demanded, or to a thing for which he demands Damages,

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gages, there the Defendant ought to make a better Title to himself, and to traverse the Title of the Plaintiff, *quod nota. Relv. p. 174. Preistlye's Case.*

As in Trover of Goods, the Defendant makes Title to them *paramount*, and that he delivered them to the Plaintiff to keep, by which the Plaintiff was possessed, and that the Defendant, as was lawful for him, took them as his own Goods. Adjudged no Plea, because he only answers the Title of the Plaintiff with a Colour of Possession; but doth not confess, nor avoid, nor traverse the Title of the Plaintiff to the goods; but gives Colour of Possession without Right or Property.

In Trespass where the Defendant pleads a Title to Lands or Goods, he must (after his own Title set forth) shew Colour; that is, feign some Shew of Title in the Plaintiff, else his Plea totally divesting the Plaintiff of Title would amount to no more than the Not Guilty.

Trespass for entring into his House, and taking and carrying away his Goods. The Defendant pleads, Before the Trespass was supposed, one *A.* was possessed of the said Goods, and the Goods being in the House of the Plaintiff, the said *A.* sold them to the Defendant, by force whereof he was possessed, and so possessed came to the Plaintiff's House, &c. and by Licence of the Plaintiff's Wife entered, &c. It's no Plea; there is no Colour given to the Plaintiff, but the Sale is good. 3 Leon. p. 265. Taylor and Fisher.

What shall be said to be a good Colour.

1. It ought to be a doubt in the Lay Gent. 19 H. 6. 21.
2. It ought to have continuance.

3. It

3. It ought to maintain the Nature of the Action.

4. It ought to be given by the first Conveyance, The Defendant derived to himself by divers mean Conveyances, and gives Colour to the Plaintiff by one last named in the Conveyance. It's ill. 2 *Rolls Rep.* 140. *Allen's Case.* 10 *Rep.* 91 b. Dr. *Leyfield's Case.*

5. Colour ought to be a good Colour of Title, and yet not a Title. Trespas for taking and carrying away an hundred Load of Wood. The Defendant justifies, for that J. S. was possessed of them *ut de bonis propriis*, and the Plaintiff claiming them by Colour of a Deed of Gift afterwards made, took them; and the Defendant re-took them. Adjudged on demurrer to be no good Colour; because the Colour given to the Plaintiff is a good Title for the Plaintiff, and confesseth the Interest in him. For Colour must not be a Title but Colour of Title: as a Deed of Lease for Life, because it hath not Livery. Grant of a Reversion without Attornment is not good; But a Deed of Goods and Chattels without other Act or Ceremony is good. And a Colour by a Lease for Years or Letters Patents is not good, because they make a good Title in the Plaintiff. *Cro. Jac.* p. 122. *Radford and Harbyn.*

6. Colour by Possession in Law is good.

The Plaintiff claiming *colore feoffamenti*, where it ought to be *colore chartis feoffamenti*.

Where Colour shall be given.

Colour shall not be given but upon a Plea in Bar.

When the Defendant pleads such special Plea, that notwithstanding it the Plaintiff may have Right, Colour shall be given. *Vide prius.*

He

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He ought to give Colour to the Plaintiff of such Possession upon which to ground an Action.

If a Man plead Descent in Bar, the Defendant ought to give Colour; for this doth not bind the Possession but the Right. 10 Rep. 90. b.

Plea shall not be good without Colour when the Property is alledged in a Person certain; because it is a Proof that no Property was to the Plaintiff. 10 Rep. 91. a. 32 H. 6. 1.

If a Servant justify, as *J. S.* was seized of Lands, and let them to *J. D.* and he as Servant to *J. D.* enter'd, he ought to give Colour. *Vide* 10 Rep. 89, 90. *Cro. Eliz.* 76. *Becker's Case.*

J. S. brought Trespafs for taking away his Goods in *S.* The Defendant alledgeth, *D. fuit Parson de S.* and he as his Servant took these Goods as the Goods of his Master, and the Plaintiff would have taken these Goods from him, and he would not suffer him. This was held an ill Plea, because the Defendant did not acknowledge Possession in the Plaintiff, nor Property in him at any time of the said Goods. 2 H. 4. 7. a.

The Defendant justifies, for that *J. S.* was seized in Fee, and lett to *B.* for Years; and he as Servant to *B.* justifies the Damage-Fesant; and it was demur'd, because he gives not any Colour. *Per Cur.* for this Cause the Plea is not good, it being shewed for Cause; otherwise not, for it is but Form. And a Difference was taken where the Defendant justifies as Servant to another, whose Free-hold it is, without shewing any Title, and where he shews a Title, as in this case is done. *Cro. Jac.* 229. *Patrickson and Barton.* *Cro. Eliz.* p. 76.

Where

Where Colour shall not be given.

Where the Matter of the Plea bars the Plaintiff of the Right, no Colour shall be given although he had Right; for it would be in vain to give Colour of Right, and to bar him if he had Right.) As if a collateral Warranty be pleaded in a real Action, or if a Fine be pleaded, or Statute, &c. Otherwise where he pleads a Descent; for this doth not bar the Right but the Possession.

If an Estoppel be pleaded, he shall not give Colour.

If a Man convey to himself a Title by Act of Parliament, he shall not give Colour.

He who claims by Sale in a Market overt, shall not give Colour if he pleads generally. But if he pleads that J. S. was possessed as of his own Goods, and sold them in a Market overt; there he shall give Colour because he confesseth no Interest in the Plaintiff. 22 H. 6. 1.

If the Defendant pleads that the Goods were waved *infra manerium*, he shall not give Colour.

So if he justify for a Wreck.

If the Defendant claims Title by the Plaintiff himself, he shall not give Colour. In Trespass the Defendant saith, That the Place where, &c. is an Acre of Land whereof the Plaintiff was seized, and thereof being seized in feoff J. S. whose Estate he hath. This is not a good Plea; for there wants Colour. But a Feoffment of the Plaintiff immediately, is a good Plea. 10 H. 7. 14. b.

When the Defendant justifies for Tithes, he shall not give Colour. For to whomsoever the Lands belong, the Tithes belong to the Parson.

If the Defendant justify as his Free hold, and conveys Title to his Master.

If

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If the Defendant justifies as a Servant.

When the Defendant pleads to the Writ or the Action of the Writ, no Colour shall be given.

Where a Plea is an absolute Bar of Property no Colour shall be given.

Colour shall not be given to a Stranger who infeofed the Plaintiff.

Colour shall not be given by a Possession determined; so where it appears in the Pleadings that the Possession is determined, but shall be given by an Estate defeated.

Where the Defendant binds the Right of the Plaintiff by Feofment with Warranty, Release, Fine, Recovery, Disseisin and Re-entry, and the like, there needs not any Colour.

He which lays no Property in the thing, but takes it as a Distress, and the like, shall not give Colour.

Colour shall not be given but upon a Plea in Bar.

Colour shall not be given but by him by whom you commence your Title, and not by a Mean in the Conveyance. *Vide supra.*

Plead, That the Defendant delivers the Trees to the Plaintiff for to re-deliver them to him when he should require it, and after the Plaintiff removes the Trees from the Place, &c. and the Defendant carries them away. It's no Plea; because in Trespass there is no Colour to punish him, for that he had not any Interest against him, and no Property against him. *Aliter* of mesne Bailment. 5 H. 7. 18. a.

Presidents of Colours.

Plowd. fo. 22, 29.

Dier 112. a.

Colour Twice given. *Plowd. Com. 164, 165.*
Hill and Graunge. Et

Et Sparsim in Presidents.

Colour super Titulo per Feofment. Ra. Entr. 629, 641. Co. Entr. 652.

Simil. sur Title per Descent. Ra. Entr. 631, 632, 633.

Simil. sur Fine lewyed. Co. Entr. 673.

Simil. per Devise. Ra. Entr. 656, 658. Co. Entr. 652, 657.

Transf. Title per Feoffament. Et Color quod Quer. clam. per chartam dimissionis, &c. & ne dit, fact ante Feoffament. 1 Co. 108. bis.

Colour in Trespas de Averijt abductis. Ra. Entr. 629.

Quod Def. fuit Executor & fuit possess. de bonis. Et Quer. colore priore testamenti seisiuit bona quæ Def. cepit, &c. Ra. Entr. 641.

De bonis capt. Bar quod Def. ea emebat, & Quer. pretendens donum bonorum ante vendition. abstulisse voluit a Def. quod Def. non permisit. Ra. Entr. 676.

C A P. XIII.

*Of General Rules of Pleading, and of Pleas
amounting to the General Issue.*

AND now I come to my chiefly intended and most important Design, to treat of the Pleadings in Trespafs, which take up a great part of our Law-Books, and which are generally extraordinary nice and curious, especially the Learning of Traverses. Having therefore handled the three Preliminaries (as I use to call them) the Common Bar, the Novel Assignment, and Colour, and shewed the true Notion and Nature of them, I shall in the next place set down some General Rules and Cases of Pleadings in Trespafs, and after particular Bars and Justifications, and then go on to the Nature and Order of Traverses with Replications of *Injuria sua propria*, and other Matters relating to Pleadings; as shewing Title, when the Plea amounts to the general Issue, &c.

*General Rules of Pleading to Actions of Trespafs
Vi & Armis.*

1. *Whensoever a Man cannot have Advantage of the Special Matter by way of Pleading, there he shall take Advantage of it in the Evidence.* As the Rule of Law is, That a Man cannot justify in the killing or Death of a Man; therefore in that case he shall be received to give the Special Matter in Evidence, as that it was *se defendendo*, or in Defence of his House in the Night against Thieves and Robbers, and the like.

2. By

2. By Stat. 7 Jac. c. 5. in any Action on the Case, Trespas, Battery or False Imprisonment against any Justice of the Peace, Bailiff, Mayor of City or Town Corporate, Headborough, Tithing-Man, Constable, Collector of Subsidy in any of his Majesty's Courts in *Westminster*, or elsewhere, concerning any thing by any of them, by reason of any of their Offices aforesaid, and all others in their Aid and Assistance, or by their Commandment, &c. they may plead the General Issue, and give the Special Matter for their Excuse or Justification in Evidence.

3. If the Defendant doth not answer or traverse to every Trespas laid in the Declaration, the Plaintiff shall have Judgment. For the Plaintiff's Declaration must be answered fully. *Siderf. p. 440. Webb and Bell.* When one answers not the Vendition, though he answers all the rest of the Declaration, it's no Plea. 1 *Keb. 204.* So a Trespas *Equis, Bobus, Vaccis*, he answers to the Trespas *Equis & Vaccis*, but saith nothing to the *Bobus*. 2 *Keb. 219. Catesby and Daniel.* In Trespas for taking, chasing and impounding, the Defendant saith nothing to the chasing. It's a good Exception on Demurrer. 2 *Keb. 601.* the Justification of Distress by *quoad residuum transgressionis*, is not sufficient without answering to the feeding and treading the Grass. 2 *Keb. 631. Webb and Bell. Vide postea Tit. Justification.*

4. Regularly, whenever a Man doth any thing by force of a Warrant or Authority, he must plead it. *Vide infra sub Tit. Justification.*

5. He which makes a Special Justification, ought to make it of such a thing which is not justifiable

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fiabile to be done, unless for some special Cause; otherwise it will amount to the general Issue. Trespafs for Timber, The Defendant saith, That a Stranger was possessed, and gives this to him, *absq; hoc* that he was culpable to the Plaintiff. This was void and but the General Issue. So in Trover (for this Rule should be well observed.) The Defendant pleads the taking at *L.* by force of a Custom, which amounts to a Gift in Law, and after justifies the Conversion in *D.* This is no more than *Non Culp.* for it is as much as if he had said, That an Estranger gives them to him at *L.* by force of which he converted them at *D.* this is but a Conversion of his own Goods, and therefore amounts but to *Non Culp.* 1 *Rolls Rep. p. 1. Hill and Hawkes.*

6. If any Man have Interest to a thing by the Grant or Assent of another, and the Party which hath such Interest may not have the principal thing without doing some other thing, he may do the said other thing and justify it. Or, *a Man may always justify the necessary Circumstance, where he had Title to the Principal Thing.* If a Man grant to me all his Trees growing in his Wood, I may cut them and carry them over his Land; and tho' his Grasse be trodden down with the Carriage, he shall not have Trespafs for this: For the Trees are such things that if they are not carried with Carts, he cannot have them, nor make his Profit of them. But if one sell all his Fishes in his Pond, and the Vendee digs a Trench, and lets the Water all out, Trespafs lies: For he may take the Fish by Nets or other Engines. But for coming on the Banks he may justify. *Plowd. Com. 16. a. Reniger and Fogossa.*

7. If he which Pleads in Bar is prescribed to a certain time, he ought to shew the Day of his Act certainly. As if one plead in Bar by Entry for *Mortmaine*, he ought to shew the certain time of his Entry; so that it may appear to be within the Year. So if one justify for Common between *Lammes* and *Candlemas*, he ought to shew certainly the time of his using it, so as it may appear to be done within the time. So he who justifies by Licence, Warrant, or Authority, always ought to shew the time certain of his Justification. *Plowd. Com. 33. b. Colthirst and Bejusken.*

8. By Stat. 23 H. 8. c. 5. in an Action of Trespas, or other Suit, against any Person for taking any Distress or other Act doing by force of the Commission of Sewers, the Defendant shall make Avowry, Conusance or Justification by Authority of the Commission of Sewers, &c. And the Plaintiff shall reply *de injuria sua propria*, &c. *Co. Lit. 283.*

9. In Trespas of breaking his Close, upon Not Guilty he cannot give in Evidence that the Beasts came through the Plaintiff's Hedge, which he ought to keep; neither can he upon the General Issue justify by Reason of a Rent-Charge, Common, or the like. *Co. Lit. 282. 3.*

Of swearing his Plea.

10. If an Action of *faux Imprisonment* is laid in *London*, and the Defendant pleads that he was *tempore quo*, &c. A Justice of the Peace of the County of *Cavan* in *Ireland*, and on Oath there made before him by *J. S.* that the Plaintiff had stolen two of his Sheep, the Defendant did com-

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mit the Plaintiff to Prison, *quæ est eadem Imprisonment, &c. absq; hoc.* that he is culpable in London, *seu alibi extra Comit. Cavan.* In this case the Defendant must swear his Plea, because it's a Foreign Plea, and ousteth of Jurisdiction. An Action of Trespas is laid in London, the Defendant cannot plead a Release made to him in Surry, unless he will swear his Plea to be true; because the making of the Release being a Transitory Act, may be pleaded where the Action is laid: But where the Matter of a Foreign Bar is Local, it is not accounted a Foreign Bar; because the Defendant traverseth the Fact in that County where the Plaintiff hath laid it.

11. The Plea being ill in in part, is ill in the whole, although he doth justify some part well: For an entire Plea may not be good in part and ill in part; for that such entire Plea is not divisible. 1 Sanders Rep. 27, 28. Earl of Manchester vers. Vale. Cro. Eliz. 268, 330, 434. Cro. Jac. 27.

12. The Defendant pleads in Trespas, *Quia Plaintiff obstruxit viam cum januis prædict.* he broke them. The pleading by a *Quia* is adjudged ill; it's not positively averred. So [*eo quod*] is adjudged ill pleading. Cro. Eliz. 441. Gooday and Michael. Dier 257. b. 1 Sanders 117. cited in Cutler's Case.

13. If a Man Justify Imprisonment as Sheriff, and saith nothing as to the *vi & armis*, yet the Plea is good. For *vi & armis* is but Matter of Form, and aided by Stat. 27 Eliz. c. 5. of General Demurrers. 1 Sanders p. 81. Law and King.

14. It's

14. It's no Plea in Trespafs that another Trespafs is depending. *Cro. Eliz.* 326. *Quære.*

15. In some Cafes a Man may alledge Special Matter, and conclude with a Demurrer. As in Trespafs by *J. S.* for the taking of his Horfe, the Defendant pleads, That he himfelf was poffefft of the Horfe, until he was by one *J. S.* difpoffest, who gave him to the Plaintiff. The Plaintiff replies, That *J. S.* named in the Bar, and *J. S.* the Plaintiff were all one Person, and not divers: And to the Plea pleaded by the Defendant in the manner, he demurs in Law. And the Court held the Plea and Demurrer good: For without the Matter alledged he could not demur. *Co. Lit.* 72.

In Trespafs for breaking his Clofe, &c. The Defendant *quoad vi & armis*, pleads *non culp.* without faying *de hoc ponit fe fuper patriam*, and pleads over to the Trespafs. The Plaintiff demurs generally. *Per Cur.* it's Matter of Form, and the Plaintiff fhall not have Advantage of it without fhewing it. *Siderf.* 216. *Thacker* and *How.*

Pleas amounting to the General Issue, and where a Man pleads the General Issue, and where he muft plead Specially.

Where the Defendant pleads a Title to Lands or Goods, he muft (after his own Title fet forth) fhew Colour, *i. e.* feign fome Shew of Title in the Plaintiff; elfe his Plea totally divesting the Plaintiff of Title, would amount to no more than Not Guilty.

Vide prius sub Titulo General Rules of Pleading in Trespafs. *Regula* 5.

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In Trespas for entring into Land, the Defendant pleads his Entry by a Lease for Years: This amounts to no more than not Guilty, and the Plaintiff may demur upon it. *Stiles Rep.* 355. *Faques Case.*

Trespas for Entry and pulling down Posts of a Fishing. The Defendant pleads he was Lord of a Manor wherein was the River *Avon*, in which they had a Fishing, and because the Plaintiff set up Posts there, he pulled them down. This amounts to the General Issue, unless there had been a Traverse *absque hoc* that he pulled down the Posts in the Plaintiff's Fishing. *2 Keb.* 57. *Hely and Raymond.*

If the Plea in Bar doth not answer the Declaration, as in Trover, the Defendant justifieth Distress for Toll, which is no Conversion, then he that demurs need shew no Cause of his Demurrer, though the Plea do amount to the General Issue. But where the Bar doth answer the Declaration, as in Ejectment, or in Trespas, the Defendant pleads his Free-hold, and gives no Colour, or otherwise pleads informally, in this case the Demurrer must be Special. *2 Keb.* 57. *Skevington against Reynolds.*

Trespas for entring his Close and taking Corn. The Defendant justifies Generally as Servant to the Parson, and that the Corn was Tithes severed from the nine Parts. The Plaintiff demurs, because this amounts to the General Issue, Not Guilty. But *per Cur.* this is a good Plea; for as to the breaking the Close, such Matter cannot be given in Evidence, and the Justification goes to both. But if the Action had been only for the Corn, this would be but the General Issue; As in Trespas for an Horse, it's no Justification to say the Horse is the Horse of J. S. and that he as Servant took him; for if the Property be not in the Plaintiff

tiff, the Defendant may as well in the Trespafs as Trover be found Not Guilty. 2 *Keb.* 44, 71. *Minors* against *Hogson*.

One brought an Action *de Parco fracto*, and declared on the Breach of a Pound, and taking out of Beasts. As to the taking out of Beasts, the Defendant pleads Not Guilty; and as to the breaking the Pound, That he was Lord of the Soil on which the Pound stood, and that he brake off the Lock, and put on a Lock of his own. *Per Hob.* he ought to plead the General Issue; for in Verity this is not any Breach of the Pound, except the Beast come out of it. *Winch. Rep.* p. 80.

The Defendant justifies the taking as of his own Cattle. This in a Bar amounts to Not Guilty. So in Trespafs for taking Trees, &c. The Defendants plead they were our Trees, growing on our own Soil, and we cut them, &c. And the Plea was challenged; wherefore the Defendant pleaded over without that that he took the Trees of the Plaintiff. 1 *Leon.* 178. 22 *Ed.* 3. 18.

In Assault and Battery, *Non Culp.* is a good Issue if the Defendant committed no Battery at all. But regularly, if the Defendant hath Cause of Justification or Excuse, then can he not plead Not Guilty; for then upon the Evidence it shall be found against him, for that he confesseth the Battery, and upon that Issue cannot justify it; but he must plead the Special Matter, and confess and justify the Battery.

If in Battery the Defendant may justify the same to be done of the Plaintiff's own Assault; he must plead it specially, and must not plead the General Issue. *Co. Lit.* 208. *Vide* more of this before in *Tit. General Rules of Pleading in Trespafs*. And further observe Briefly, in these Cases a Man may plead Not Guilty;

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1. When the thing supposed to be done for Matter of Fact is not true.

2. When the Matter of which the Plaintiff complains is not a Trespass, but some other Offence, and some other Action but not (Trespass) is given for it.

3. When the Lands or Goods for which the Action is brought is mine and not the Plaintiff's. *Vide 5 Rep. 85. Co. Lit. 282, 283.*

When Liberty is given by an Act of Parliament so to plead, and give the special Matter in Evidence, as in case of Officers. *Vide prius, & 21 Jac. c. 19.* in case of Trespass brought against Commissioners of Bankrupt, they may plead Not Guilty, and give the Special Matter in Evidence.

If it be out of the Cases aforesaid, and the Defendant have Matter of Justification or Excuse to plead, he must be sure to Plead it specially.

If one have Corn upon another's Land, and therefore enters to take it, and the Owner of the Land sue him, he must justify and not plead Not Guilty. *5 Rep. 85.* So if he Justifies by reason of a Rent-Charge.

If he put his Cattle into Land by Agreement with the Plaintiff, he must plead it Specially. *Old Book of Entries, 596, 605.* And yet,

If he be to justify by reason of a Title to Land, he may plead Not Guilty, and give the Special Matter in Evidence. *Co. Lit. 283. 22 H. 6. 3.*

A Man is allowed to plead Specially, where he may plead the General Issue, and give the Special Matter in Evidence.

1. When a Defendant by his Plea doth admit some Colour of Action to be in the Plaintiff, but sheweth some Special Matter of Fact to avoid it. *10 Rep. 88. Dr. Leyfield's Case. Vide 1 Regula Placitandi 303, 304.*

2. When

2. When there is a Matter of Law pleaded that is not proper for a Jury, then though it amount to a Not Guilty or the general Issue, yet there cannot for that Cause be a Demurrer to the Plea, because it would perplex the Jury. A Release is a Bar in Law, yet may be given in Evidence; it may be pleaded without giving any formal Colour, for that it implieth the Plaintiff might have his Action else; and the Defendant need not intrust a Jury with Matter of Law, but refer it to the Consideration of the Court. In Trespafs for taking away the Goods, the Defendant pleads he bought them in Market overt. This is a good Plea, because it acknowledgeth the Plaintiff hath a good Cause of Action, if it had not been for the Property's being by act of Law altered and vested in the Defendant; and a discharge in Law from the Action, is most natural and proper to lay before the Court, and represent it as a Matter of Law, and not leave it to the Lay-Gents to enquire of.

Justification, Excuse by Involuntary Trespafs.

Trespafs *pedibus ambulando*. Bar quod Def. *carriatus fuit sur terre del Quer. per force & Violence des auters, & nemy voluntarie*. It's a good Plea. *Stiles Rep. p. 65. Smith and Stone.*

If a Man drive my Cattle into the Land of another, he is a Trespaffor and not I that own the Cattle. *Stiles ibid. Vide supra.*

Trespafs *quare domum & clausum fregit*, and taking away a Gelding. The Defendant pleads, That he for fear of his Life and Wounding of twelve armed Men, who threatned to kill him if he did not the Fact, went into the House of the Plaintiff and took the Gelding. This is no Plea to justify the Trespafs. I may not do a Trespafs
to

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to one for fear of the Threatnings of another. *Stiles Rep. 72. Gilbert and Stone. Allen Rep. 35. mesme Case.* He pleaded, That for the said Menace he entred the said House, and returned immediately through the same Close, *qua est ead. Transf.* Its no Plea, neither is the Plea good for the Manner, because he did not shew that the way to the House was through the Close. *Ibid.*

Vide supra. p. 1.

Trespas for chasing Sheep. The Defendant pleads they were Trespassing on his Land, and he with a little Dog chased them out, and as soon as the Sheep were out of the Land, he called in his Dog. A good Plea. So if a Man be driving Beasts to the Pound, and they escape into *A.* and he presently retakes them, it's *dampnum sine injuria.* A Man may justify chasing of Sheep for taking one of his own. *Jennings and Mayrstone's Case.* A Man cuts Thorns, and they fall into another Man's Land, and in Trespas he justified it. Yet *per Cur.* notwithstanding this Justification Trespas lies, because he did not plead he did his best Endeavour to hinder their falling there. *Popham at the End, 161. Miller and Fawdry.*

A Man drives Goods through a Town, and one of them goes into another Man's House, he may follow it.

If Deer be out of a Forrest, the Owner of the Land where they are may hunt them.

I may pursue a Fox into another Man's Land. *Popham 162.*

Vide plura Sparsim per tot.

If my Cattle in driving catch a Mouthful of Corn, it's no Trespas. *Bro. Tresp. 321, 351.*

Def. plede quod averia Quer. contra voluntatem Def. intraver. in loco in quo, &c. cum Averiiis suis. Tomps. 402.

By Stat. 21 Jac. c. 16. it is enacted, That in all Actions of Trespafs *quare clausum fregit*, wherein the Defendant shall disclaim in his Plea to make any Title to the Land in which the Trespafs was done by Negligence or Involuntarily, and do render or offer amends sufficient for the Trespafs before the Action brought, whereupon or upon some of which the Plaintiff shall be forced, and if the said Issue shall be found for the Defendant, or the Plaintiff be Nonsuited, such Plaintiff shall be clearly barred from the said Action or Actions, and all other Suits concerning the same.

C A P.

C A P. XIV.

Of Justification concerning Inheritances and th' Appurtenances; as Entry into Land, Digging Soil, Cutting Trees, &c. by way of Excuse, as for Publick Good, Necessity, Liberty per Law, for the Execution of Law, &c.

A Man may justify sometimes that what he did was for the Publick Good, or in case of Necessity, or that he had Allowance by Law for what he did, or for the Execution of Law, or the like. In treating whereof the Learning and Equity even of our Common Law will appear.

For Publick Good.

One may justify the entring into another Man's Land in pursuit of a Badger (which is a noxious Creature) but he may not justify the entring into the Land of another to find one. But if a Badger be earthed he may not dig for him. 2 *Bulstr.* 60, 61, 62. 2 *Rolls Abr.* 558. *Hedges and Mynne.* And so of other noxious Vermin; so Foxes, Otters, but not Hares. If a Man Hawk in my Land without leave, I may have this Action.

Trespas quare Clausum fregit, & pedibus ambulando, &c. the Defendant makes a special Justification, that he did enter into the Plaintiff's Close to search for Sheep that were stolen from him. *Per Rolls* it's an ill Bar. For all that he hath alledged by way of Justification, is but matter of Private Profit to himself, and not for the Publick Good:
for

for he went not thither to find or apprehend the Felon. *Stiles Rep.* 165. *Toplady* against *Staley*.

The Defendant justifies, Apple-Trees, &c. in *pomario suo crescentia furata eradicata & asportata fuerunt per M.* and the common Fame was, he took them to the Plaintiff's House; whereupon he went to the Plaintiff's House to search for them, and there found them, &c. It's no Plea. The Difference is between Felony and Trespas. If J. S. takes my Horse and brings him to the Land of J. D. it is not lawful for me to enter into the Land to take him. *Aliter* if J. S. feloniously steal my Horse (but if J. S. take my Horse into his own Stable, I may justify my entry to retake him.) *Quare* if Entry and Search be lawful on Common Fame only. *Dier* 235. *2 Rolls Rep.* 55. *Higgins* and *Andrews*.

If Cattle are Stolen and put into my Ground, I may take them Damage-Fesant, or bring Action of Trespas against the Owner; and the Owner cannot take them away without my Licence. *Stiles* 167. *Toplady's Case*.

In Trespas *quare Clausum fregit, & Herbam*, &c. the Defendant may not justify for hunting a Fox. *2 Rolls Abr.* 558. *Lach.* 120. *contra. vide Bulstr.* 2. 661.

One may justify the making Bulwarks in time of War, and pulling down an House that burns. *Dier* 36, 40.

But it is not lawful for a Man to do a Wrong to another, although it be for his Profit; as if I see my Neighbour's Beasts in another Man's Soil doing damage-Fesant, I may not enter and drive them out. *Dier fo.* 36. *Pl.* 38, 39. *vide supra*.

Trespas for breaking Soil and setting up Hurdles. Justify by Market or Fair, or in breaking Soil to amend the Pipes, to put in Stakes for
Fishermen

Fishermen to dry their Nets, as in Kent. *Siderf.* p. 291. *Popham* and *Woolcott.* 2 *Bulstr.* 61.

In Trespafs for digging his Soil, the Defendant justifies he was seized of seven Acres, wherein was a Cole-Mine, and the Servants of the Defendant working *pro Bono Publico*, the Water arose, and they digged a Trench in the Plaintiff's Soil to convey away the Water. It's not good. A Man cannot remove a Nulance in his own Ground, to the Prejudice of another. *Aliter* of an ancient Water-Course. 2 *Keb.* 13, 58. *Howard's Case.*

Justificat' quod Def. simul cum aliis Inhabitantibus Villæ prædictæ per eorum communem assensum freger' & prosternauer' domum quer' tempore conflagrationis. 2 *Browne* p. 175.

For Necessity.

If a Man cuts down Trees and they fall into another Man's Land, he may enter and take them. 2 *Bulstr.* 61, 62. 13 *H.* 8. 16.

If Trees grow in my Hedge, and the Fruit of such Trees hang over your Land, and falls into it, I may justify the gathering them. *Latch* 120. *Miller's Case.*

When a Man doth a lawful Act, and of necessity another thing happens which he could not prevent, no Action of Trespafs lies. As for Example, a Man may justify the retaking his Beasts out of another Man's Land after they escape as in driving them to the Pound. A Man in Ploughing his Land, his Beasts are unruly, and as he ploughed his Land (he turning upon the Had-land) one of the Horses took a Mouthful of Corn; this may be justified. *Latch* 119, 120. *Millen* and *Fawdry.*

A Man may follow his Hawk or his Hound into another Man's Land. 2 *Bulstr.* 61. 2 *Rolls Abr.* 567.

If

If a Butcher drive Sheep in the Streets, and they run into the House of a Stranger, he may justifie the taking them out of the House, *per Dodderige*.

If a Man had a Way over my Land for his Beasts to pass, if the Beasts bite the Grass by Morsels, this is justifiable. 2 Roll. Abr. 566. *aliter*, if they stay long there.

For Recreation by Prescription.

Trespafs for breaking his Close, the Defendant prescribes that all the Inhabitants of a Village, time out of memory, had used to dance there, *Omni tempore Anni ad Libitum suum*, for their Recreation, and so justify'd the dancing there: Issue upon the Prescription, and Verdict for the Defendant; and to save his Costs, the Plaintiff moved in Arrest of Judgment, that this Prescription to dance in the Freehold of another, and spoil his Grass, was void, especially as this is laid, *Omni tempore Anni*, and not at seasonable times. Also it is ill laid in the Inhabitants, that altho' they may prescribe in Easments, as 6 Rep. Gateward's Case, and some other Books are, yet they ought to be Easments of Necessity, as Church-ways, &c. and not for Pleasure only, as this Case is. 2. If it be good, it ought to be laid by way of Custom of the Will, and not by Prescription in the Person. But *per Cur.* this is a good Custom, and it is necessary for Inhabitants to have their Recreation. As to the 2d. perhaps tho' this had been ill upon demurrer, yet issue being taken of it, and found by Verdict, it is good, and Judgment for the Defendant. 1 Levinz 176. Abbott and Weekley.

If a Man be driving Cattle to the Pound, and they escape into another Man's Land against my Will, and I presently fetch them out, no Action lies for this against me. Bro. Tresp. 335.

N

If

The Law of Trespass.

If one be assaulted and like to be killed, and he fly over my Ground to save his life, I may not sue him for this. 37 H. 6. 37.

Liberty to enter, &c. by Common-Law.

A Man may enter into a Common Inn or Tavern and justifie it. 8 Rep. 6 *Carpenter's Case*.

The Lord may enter to Distrain, &c. *Vid. Pais.*

He in the Reversion may enter to see if waste be done if the House Door be open; so he that hath the Reversion devised to him to sell. *Plowd. Manxell's Case.* 9 H. 6. fo. 19. 13. a.

Executor may enter into the Land of the Testator to take Timber, and so may the Vendee of an Executor. 2 *Rolls Abr.* 564.

If a thing be feloniously stolen from me, I may upon fresh Suit enter. *Vid. Prius in Higgins and Andrews.* 8 Rep. 6 *Carpenter's Case*; but if my Trees are stolen, and put into the House of J. S. I may not enter to take them.

A Man holds an House at Will, and he bring Goods there, and then the Lessor puts him out, he shall have a reasonable time to take away his Goods. *Cok. Lit.* 56.

The Executor shall have a reasonable time to fetch his Goods out of the House where they are at the Testator's death. 1 *Brownl.* 224.

The Ministers and Churchwardens may enter another's Land in their perambulation. *New Book of Entries* 652.

If one is bound to pay me Money on an obligation in my Dwelling-house, he may come and tender it there; *aliter* in another Man's House. *Plowd.* 71.

For

For the Execution of Law.

Beasts are impounded in an open place, which had a Gate open; if the Sheriff comes to make Replevin, and the Owner with Arrows, &c. hinders him, he may break the Close and enter, and make Replevin. 20 H. 6. 28.

The Sheriff may enter into an House to pursue a Felon. Dier 36. Pl. 40. 5 Rep. Semaine's Case.

The Plaintiff in Replevin may justify the entry into the Defendant's Close, to shew the Beasts to the Sheriff. 3 H. 6. 37. b.

Trespafs for breaking open the Doors; and entering into the House. Defendant pleads he was Under-sheriff, and a *Fieri facias* came to him, and he made his Warrant to the Bailiff, who *ostiatunc aperto* entred to make Execution, and continued there till the Plaintiff shut the Door, and imprisoned them in his own House for 4 hours; and the Defendant hearing this, broke open the Door to free his Bailiffs. It's a good Plea, for they entered lawfully, and when the Plaintiff shut the Door against them then began the Tort, which the Sheriff may redress. 2 Rolls. Rep. 137. White and Wiltshire.

Trespafs for entring into his House. Defendant justifies by Warrant of a Justice, and doth not shew it; which *per Cur.* is needless, unless the Action be against the immediate Officer. The Replevin was *de injuria sua propria*, which is not proper here, it being matter of interest, and not barely of excuse, but *per Cur.* after Verdict it is well enough. 2 Keb. 266. Lambert and Kellum.

Trespafs of breaking an House, and taking a Cup, &c. Defendant justifies by Plaint and Judgment

The Law of Trespafs.

ment in *Wakefield*, and Precept of Execution, to which the Plaintiff demurred, because, 1. It's said *quædam curia*, not saying what. 2. It is *taliter processum* till Judgment. 3. It is said a Court *coram Seneschallo & Sectatoribus*, which cannot be a Court Baron. 4. It's said the Defendant *ut ballivus Seneschalli* took. 5. The Precept is retournable *ad proximam Session*, and the return is half a Year after. 6. The Execution is at such a place *in Paroch. pred.* and doth not say *infra Jurisdictionem*. *Per Cur.* all the Exceptions are material. 2 *Keb.* 844. *Gamble and Forrest*:

If ones Sheep be stollen, he may go into any Man's Ground where he doth suspect the Sheep are, to see the Sheep whether they be his or not. *More* 389.

Note, Tho' I do a good act, and intend it well, and it is for my Neighbours profit, yet if what I do be a Tort in Law it will not excuse me. In Trespafs for taking Tithes, Defendant saith the Tithes were severed from the 9 Parts, and were in jeopardy of being eaten by Cattle, therefore the Defendant carried them to the Plaintiffs own Barn, it was adjudged no Plea (*durus Sermo.*) 15 *H.* 7. 17. *vid. plus supra.* *Dier* 36. b.

Of Justification by prostration of a Nuisance,
vid. supra, cap. 4. and Sparfem in aliis locis.

Trespafs for erecting his Close, and casting down his Hurdles, fixt to his Freehold. Defendant pleads that the place where is *communis platea*, in such a Village and a place of Market there, and prescribes to place Stalls there, and for that the Hurdles were there fixt he cast them down, it seems the Action lies not, for the Place where is *communis platea*, and erecting of Hurdles there a Nuisance, which any Man may throw down;
but

but because this did not appear upon the Declaratⁿ but by the Plea, which is ill, and the Defendant had not pleaded and relied upon it but upon other Matter, which is not fufficiently pleaded, they gave Judgment *pro Quer.* 1 *Levin.* 184. *Popham* and *Woolcott.*

Justification as Bailiff or Servant.

I fhall next proceed to fpeak of Justifications by Title or Interest to Lands and Tenements, and incidents thereto, as Tithes, Trees, &c.

But first I fhall fay something about Justification by a Servant or Bailiff.

Defendant justified as Bailiff to *J. S.* Plaintiff replies, that the Defendant took his Cattle of his own wrong, *absq; hoc* that he is Bailiff to *J. S.* *Per Cur.* if one hath good cause to distrain my Cattle, and a Stranger of his own head takes my Goods not as Servant or Bailiff to another, in trespass he cannot excuse himself by saying he did it as Servant or Bailiff; but if one distrains as Bailiff, tho' in truth he is not one, if he in whose Right he justifies assent to it, he shall not be punished as a Trespasser, for this assent shall have relation to the time of the distress taken. 2 *Lev.* 196. *vid.* 216.

There is a diversity where a Defendant justifies as Servant to another whose Freehold it is without shewing any Title, and where he shews a Title as in the Case of *Patrickson* and *Barton.* *Vid. supra tit. Colour.*

Justificatio per Servant qui pledes title de son Master. *Winch. Entr. p. 1118.*

Justification as a Servant of a Parson for Tithes. *Winch. Entr. p. 1120.*

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Def^r pleades quod quedam C. fuit seise de loco,
&c. & ipse per mandatum pred. C. fecit le tres-
passe. Tompl. 319.

Justificatio ut Serviens in libero tenemento Ma-
gistri. Co. Entr. 644.

Unus in jure proprio, & alter ut Serviens.
Ra. Entr. 648.

Justif. ut Serviens al Seignior del common.
[Sanders, p. 25.

C A P. XV.

Of Bars and Justifications in Trespas by
Title or upon Title.

By son Franktenement.

QUOD locus in quo est liberum tenementum. Def.
Repl. quod est liberum tenement. quer.
Ra. Entr. 647. bis. Cok. Entr. 675. Ash. 436.
& non def. & traverse. Tomps. 318.

Similis Bar per Servien.

Per 2. quod locus est liberum tenementum eorum,
& alter justificat ut Serviens.

Quod est liberum tenementum def. & uxor in
jure uxor.

Bar per liberum tenementum quer. confesse le
frankenement & pleads un demise devant. def.
riens ad en les tenements, & assignment del lease
al querenti. Winch. Entr. p. 1106, 1107.

In Trespas the Def. justifies under Sir Tho. H.
as Servant; the Plaintiff replies, it's his Soil, and
traverseth *ab/q; hoc* that it's the Freehold of the
Defendant and Issue, and special Verdict on a
Conveyance. 2 Keb. 784. Crossing and Skid-
more.

In Trespas, if the Defendant will say it is his
Freehold, the Plaintiff may say that it is Freehold,
and traverse without that, that it is the Freehold
of the other, this is a good Issue, tho' perhaps
uncertain. Plowd. Com. p. 52. a.

By Grant del Roy.

Rex post inquisit' sur Felo de se concessit terras
Def. Ra. Entr. 608. Plowd. 254.

Inquisitio post mortem attincti in Parliament' &
Grant de ceo. Ra. Entr. 633.

Title is made to the Goods by Seizure, for that K. P. and Queen Mary, by Letters Patents enrolled in Chancery *dederunt & concesserunt ville de L.* Liberty of a Market, &c. and shews a special cause of Seizure as an Officer there, it's erroneous, because he saith not *sub sigillo magno confect.* Crok. Eliz. 117. Kingdon and Barne.

Trespas for taking and impounding his Beasts until he paid 3*l.* 7*s.* Defendant pleads a Suit in the County Court brought by J. S. against the now Plaintiff, where the Defendant pleaded *Librum tenementum* of the Earl of Arundel, and justifies the taking damage fesant in the Freehold of the Earl, to which the then Plaintiff pleaded in bar of the Conusance, that the Earl ought to make the Fences, and for default of reparations the Beast escaped, and upon this Issue was taken that the Fences were in good repair, and the Jury found them out of repair & *assidunt damna*, &c. and Judgment and a Precept in nature of a *Scire facias* under the Seal of the Sheriff, the Defendant being Bailiff to Levy, &c. *per Cur.* the Judgment is void & *coram non judice*, because after Freehold pleaded the County Court had no Jurisdiction, for Freehold cannot be tried without Writ. It was objected, that the Franktenement was not Tried there, but it arose upon collateral Matter (*scil.*) if the Fences were in repair, but *per Cur.* after Freehold pleaded, they had no power to proceed in the Cause, neither directly nor collaterally, and Judgment *pro Quer.* 3 Lev. 203. Cannon and Smallwood.

By

By Fine.

Quod T. seifitus levarit finem al I. qui demisit
def. Repl. quod H. fuit seifitus quousq; T. disseiuit
eum & levarit possessionem H. reintravit infra
5 annos & obiit de quo descendebat al W. qui demi-
sit quer' Repl. Traverse le disseisin. Cok. Entr.
 673.

Quod quer' seifitus levarit finem W. & G. uxor'
eius qui feoffaverunt Def. Repl. quod finis fuit le-
vatus ad usum & W. uxor' ejus super separales
conditiones non performat' Repl. quod quer' relaxa-
vit omnes conditiones pro cond' fract'. 2 Cok.
 Rep. 6.

By Tenancy en Common.

Def. fist title in Communi cum quer' per quod
fecit transf. Tomps. 388.

Vid. supra, Title Tenant Common, Tresp. pro
Traverse tenement. in Com.

By Jointenancy.

Per Cobeirs, up. b. 168.

Pro feno un versus auter. 1 Browne 371.

By Feoffment.

Quod J. seifitus feoffavit R. & al. & R. feoffa-
vit Def. de parte. Novel. assignment & non cul.
Ra. Entr. 641.

If a Man plead a Feoffment, he ought to tra-
 verse all Trespasles done before. *Hobart, p.*
 104.

If the Defendant will plead a descent to him,
 and the Plaintiff saith that after this the Defendant
 enfeoffs

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enfeoffs him, and the Defendant saith this Feoffment was upon Condition for the breach whereof he entred, this is a departure from the Bar. 10 Br. 21. cited in Plowd. 7. b.

Def. en trespasse clâimes per feoffment & done colour al quer. Tomp. 341.

By Tenancy en Tayle.

Quod A. seifitus convenit stare seifitus ad usus in Tallio & terre devenere Def. Ra. Entr. 659.

Estate Tayle & Common recovery pleaded. Cok. Entr. 654.

Pleading seisin in Tayle, and shew not how Heir in Tail. Plowd. Com. 43. Wymbish and Talbois.

Bar. per 2 Def. quod R. seifitus dedit. J. in Tayle, remanere R. uni Def. in Tayle. J. fuit seifitus quousq; L. ipsum disseisivit, qui fecit continuum clameum. L. obiit & terre descend. filio super cujus possessionem J. reintravit & obiit seifitus sine herede per quod R. unus defend. intravit & demisit W. alteri Def. & querens clamans colore, &c. super cujus possessionem W. in jure proprio & R. ut serviens reintravit. Repl. quod R. seifit. fuit & feoffavit L. qui obiit & mesuag' descend. filio qui dimisit quer. qui fuit possesse quousq; domum fregerunt, absq; hoc quod L. disseisivit J. 1 Brown 374.

By Descent.

Quod pater Def. fuit seifitus de terris que descend. Def. Ra. Entr. 631.

Un. descent uxor. Def. Ra. Entr. 632.

Descent des terres en Gavelkind. Ra. Entr. 632.

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Quod pater Def. fuit seise, & quod Def. post mortem ejus intravit & fecit trans. Repl. quod quer. fuit seise devant & traverse le dying seised del pere de Def. Tompl. 337.

By Recovery.

Per recovery en Formedon. 1 Brown, 374.

Per recuperationem in brevi de dote super grand cape. 2 Brown, 287.

By Disseisin.

Plea, liberum tenementum. Repl. per disseisin. Rejoinder per Maintenance de Franktenement & traverse le disseisin. 1 Brown, 373.

Quod locus in quo est liberum tenementum J. & al. & Def. ut serviens cepit equam damn' faciend' Repl. quod Def. fuit seisi' quousq; Def. disseisvit eum, & quer' reintravit. Repl. per maintenance del franktenement & traverse le disseisin. Ra. Entr. 647, 648. Cok. Entr. 280. Ra. Entr. 648.

Quod locus in quo est liberum tenementum Def. Repl. quod T. seisi' de manerio unde, &c. demisit quer' pro annis qui fuit possessionat' quousq; Def. eum expulit & disseisvit T. 3 Br. 467.

By Entry pur condition fracti]

Justif. quod Def. intravit in terras pur condition broken virtute conditionis in Indentura dimission'. specif. Tompl. 310.

Quod Def. intravit domum, &c. pur condition infreint sur mortgage. Tompl. 339. Repl. mar- teyne le narrat & traverse le peaceable Entry. Tompl. 340.

Quod

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Quod quer' levavit finem W. & G. uxor' ejus qui feoffaverunt Def. Repl. quod finis fuit levat' ad usum W. & uxoris super sepealibus conditionibus non performat'. &c. 2 Cok. 6.

By Devise.

In Trespass, the Defendant pleads such an one was possessed of a term for Years, and being so possessed by his last Will and Testament, devised that to the Defendant and died; after whose death the Defendant entred, and was possessed by vertue of the devise. It seems a good Plea, tho' the Defendant had not expressly alledged that the Devisor died possessed, &c. for his Plea implies that, and it is only matter of form. *Winch. rep. 53.*

Quod seisit' demisit al C. pro annis qui devisavit terminum. Vid. B. Ub. p. 196.

If Devisee pleads he entred for default of Payment of the Rent, he ought to shew he entered into the Land by leave of the Executors. *Stiles, rep. 65. Matthew and Herle. Vid. infra.*

By Demise and Re-entry for Rent.

Defendant pleads he was seized of the Land in which, &c. and Lett it to A. rendring Rent, at the Feast of *Easter*; and if it be Arrear at the said Feast, and ten days after, that he might re-enter, and saith the Rent was behind, &c. whereupon he entered and distrained. Demur 1. He saith he Lett it to A. but saith not *virtute cujus* he entred and was possessed, for it may be the Lessor did not wave the Possession, and then no Rent was due. 2. He saith the Rent was behind by the space of ten days, where it should be after the space of ten days. *Crok. Eliz. 262. Wood and Hamstead.*

The

The Defendant pleads that J. S. demised to the Plaintiff *reddendo* Rent ; and after by his last Will and Testament gives the Land to the Defendant, who enters for default of Payment of Rent. He ought to have shewed that he entred into the Land by the leave of the Executor. *Stiles p. 65. Matthew and Herle.*

Per Rolls, If in an Action of Trespafs *vi & armis* for entring into Land, the Defendant pleads his entry by Virtue of a Lease for Years. This amounts to no more than Not Guilty, and the Plaintiff may demur upon the Plea, and shew it for Cause of Demurrer. *Stiles Rep. p. 355. Jacques Case.*

If a Man justify by a Demise, he ought to shew that it continues. 3 *Bulstr.* 198.

The Defendant saith, his Father was seized in Fee before the Trespafs, and died seized, after whose Death the Plaintiff entred, and the Defendant re-entred. The Plaintiff replies, True it is, the Father of the Defendant died seized ; but he saith that before this, his Father made a Lease to J. S. for ten Years to commence after his Death, and that J. S. died Intestate, and Administration was committed to him, and so he enter'd and was possess'd until, &c. The Defendant demurs, because he shews not the Letters of Administration. *Per Cur.* he need not ; for he may declare here without shewing he was Administrator. 2 *Rolls Rep.* 430.

If in Trespafs the Defendant doth justify by a Lease for Years, without shewing a Place where the Lease is made, it is not amendable. 1 *Leon.* p. 81.

As to other Presidents of Copy-hold Titles *vid. Townsend's Tables*, 289. where you are referred to all the old Presidents.

In Trespafs the Defendants *separatim dicunt*, That they are severally seized of several Tenements for Life, and that they have accustomed to dig the place where for Reparation, and do not aver any want of Repair: Also being Copy-holders for Life, they should shew the Commencement of their Estates. The Court agreed *quod seperatim dicunt* is well enough; but the latter Exceptions are fatal being on Demurrer. 2 Keb. 766. Put versus Dany, &c.

Trespafs for Close breaking. The Defendant justifies, because it was the Free-hold of J. S. and he enter'd by his Command. The Plaintiff entitles himself, because the Place where is Customary Land, and that J. N. was seized in Fee, and died seized, which descended to two Daughters and Heirs, and were admitted by the Lord, and they demised to the Plaintiff. *Per Cur.* the Plaintiff hath not made a good Title; for none may entitle himself to any Copy hold, but he ought to shew a grant thereof; therefore he saying such an one was seized in Fee without shewing the Grant thereof was not good. Cro. Car. 190, Shepard's Case. *Vide plura sub Titulo de Arboribus.*

By Title des Dismes & Rectorie.

Dr. M. brought Trespafs for three Loads of Oats, &c. The Defendant justifies because the Place where is parcel of a Copy-hold in T. and makes Title to it, and justifies for Damage-Fasant. The Plaintiff shews that long before the time when, & *præd' tempore quo*, &c. he was Parson of T. &c. and that the Place where is within his Rectory, and that the Defendant lett it to H. who enter'd and plowed, &c. and set out the Corn; and that the Defendant *de injuria sua propria* took the Oats *præd. tempore quo*, &c. The Defendant

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Defendant maintaining his Bar traversed the Lease, and found *pro Quer.* and Judgment for him. It was alledged in Error that he doth not say, that at the time of the severance of the Corn he was Parson (though he might be at the time of the Trespafs) and then he makes not a sufficient Title to them. *Per Cur.* it shall be intended that he was Parson at the time of the Severance; especially the Defendant having admitted that he was Parson and the Tithes due to him, and making Traverse to the Lease, which was an idle Traverse; and this *contra* to 35 H. 6. fo. 48.

As to the References to the old Presidents, *vide Townsh. Tab.* 290.

Barr de Arboribus

The Dean and Chapter of *Pauls* brought Trespafs against J. S. for cutting down great Wood. The Defendant as their Bailiff of a Manor justifies, That there was a Park inclosed with Pale time out of memory, and that he cut the Trees for the necessary Inclosure of the Park with Pale, and employed it upon this. *Per Cur.* it's a good Justification; for it belongs to his Office to repair the Park or Buildings; but he may not make new Pales. 12 H. 7. 26. cited in *Plowd. Com.* 283. in *Greysbrooke's Case*.

Trespafs for cutting down four Ashes in, &c. The Defendant pleads *Actio non*, because long time before, &c. one J. P. was seized in Fee of the Close in which, &c. and 3 Apr. 21 Eliz. by Indenture of the same date demised to J. C. the said Close, excepting the Wood and Underwood thereon growing, *habent*, &c. and further covenanted with him *quod licitum foret* for the said Lessees and their Assigns, to take upon the Premises necessary Fire-bote and Houle-bote, to be expended

expended upon the Premiffes, or for Reparation thereof: and juftifies, as Servant he took the faid four Affes for neceffary Houfe-bote to be expended upon the Premiffes. It's an ill Plea: 1. He juftifying by force of a Covenant, ought to fhew the Indenture; for it is the Subftance of the Title. 2. Becaufe it is not fhewed that the Mafter expended them for thefe purpofes. *Cro. Jac. 291. Purify and Grimes.*

The Defendant pleaded the Place where was Parcel of the Manor of, &c. which Manor the Earl of O. lett to H. for Years, *exceptis Bofcis, Arboribus, Subboscis*; but did covenant and agree, that the Leffee and his Affigns might take reafonable Fire-bote and Hedge-bote *super Premiffa prædicta*. *Per. Cur. super Premiffa* fhall only extend to the Land lett, and not to the Woods excepted. *Cro. Eliz. p. 125. Cage and Payton.* *Aliter* if he had averred there had not been fufficient on the Land lett.

A Man gives to me all his Trees growing in his Clofe, and yet he cuts them down, and I carry them away, if he bring Trespafs againft me *quæ Arbores fuas succidit, cepit & asportavit*, &c. I may plead as to the cutting down *Non Culp.* and juftify for the residue. *Dier 305. 27. 33 H. 6. 11, 12.*

Trespafs with Cattle and breaking down Hedges. The Defendant juftifies by a Refervation in a Demife to cut up and carry away Trees, &c. *præd' W. M. reparan' & emenden' fepes ubi Arbores ille succif. effent*, &c. The Plaintiff demurs *pro his caufis*, (*viz.*) *quod in placito prædict' non allegatur quod fepes & fovere præd' fuer' reparat' & implet' fecundum concession' agreamentum & licentiam præd. acetiam quod non verificatur quod præd' proftatio fepium ex caufa præd' eft ead' unde præd' E. fuperius narravit quod fecundum*

cundum formam placitandi verificare debuit. H:
Pollexfen. *Vide plura* as to Presidents. Towns.
Tab. 290, 291.

By Herriot.

Def. justif. seizure de Bove pro Herriot Custom.
1 Browne p. 382:

Vide Reference to old Presidents of Justification
for Herriot Custom and Service. Towns. Tab.
284.

Bar per Herriot Placita gen. & specialia, p.
607.

By Distress for Suit.

He took the Beasts of the Plow, and saith only
contra Leges & Statuta, but recites them not.
Per Cur. it's well enough. But the Plaintiff doth
not aver that there were also other Beasts. *Dier*
312. 2 *Keb.* 289. *Porphery* and *Legingham*. But
he need not say there is sufficient Distress *præter*,
&c. for it shall come on the other part to shew
there was not. *Siderf.* p. 348.

For Common, *vide infra*.

Trespas's *quare clausum fregit*, and put in his
Beasts, & *ramos Arborum ipsius Gulielmi* (Quær.)
nuper ibid. crescentes succidit & asportavit. The
Defendant as to putting in his Beasts saith, That
the Place where is Parcel of the Manor of H. and
that within this Manor is a Custom that it shall be
lawful for the Lord to have Common *in terris*
omnium tenentium suorum pro vita vel annorum,
lying fresh, and that the Plaintiff was his Lessee
for Years of these Lands in which the Trespas's
is supposed. The Plaintiff demurs. As to the cut-
ting down the Trees he saith, That he made a
○ Lease

Leafe to the Plaintiff excepting *Arboribus Manerij & Bosci*, and so justifies. The Plaintiff confesseth the Exception; but saith, That the Lessor in the Leafe *concessit quod liberum esset* for the Lessee *succidere & capere* the Loppings and Shreddings of these Trees. Upon this Replication the Defendant Demurs. As to the first Point, *per Cur.* it's a void Custom and against Law, that the Lessor should have Common against his own Demise. As to the second, *Crescentes* may refer to Loppings, in which the Lessee had Interest, it being indifferent: but it was doubted, If the Lessor except the Trees, and grant to the Lessee to cut down the Loppings, and the Lessor after cut down the Trees, whether the Lessee shall have Trespafs. The Court advised the Lessee to release his Damages as to this part, and to take Judgment for the other point. *Palmer 211. White and Sayer.*

For Toll.

Trespafs for taking a Bushel of Oatmeal. The Defendant pleads to all, except one Quart, Not Guilty, and as to that justifies for Toll in the Market of *Pensance* (*viz.*) one Quart out of every twenty Gallons brought to the said Market to expose to Sale; and makes Title to the Market and Toll by Grant of one who had it by Prescription. The Plaintiff replies, That before the Grantor had any thing in the Market Queen *Elizabeth* was seized of it, and by her Letters Patents reciting that King *Richard I.* and King *John* had granted to the Borough of *Helston* in *Cornwall*, that it should be *liber Bargus*, and quit *de Thelonio*, Pontage, Passage, Lastage, Sallage and Stallage through all the County of *Cornwall*, incorporated the said Borough and preserved its Privileges; and then shews he was born within, and a free Burges of *Helston*

Helston, and so exempt. The Plaintiff rejoins, That the Burgessees of *Helston* had always paid Toll. The Plaintiff demurs generally, because this Toll is claimed by Prescription, and therefore may not be discharged by the Grant of the Kings *Richard* and *John*, which are within time of Memory. The Court doubted whether this Toll be within the Word Sallage, or any other particular Word of the Discharge: but they were of Opinion that the Charter of Queen *Elizabeth* does not discharge the Plaintiff; *ergo nil cap. per Bill.* Sir *T. Jones* 118. *Hill* and *Prior*.

Trespass for taking of four Bushels of Corn at four several days (*viz.*) two in the Market-Place at *Lanceston*, and two others in the House of *J. S.* The Defendant as to all *præter* sixteen Pints, pleads Not Guilty, and as to them *Actio non*, and justifies, as Servant to the Mayor and Commonalty of *Lanceston*, and at their Command, and shews that *Lanceston* is an ancient Borough, &c. and time out of memory had a Market every *Saturday* in the Week, and prescribes to take a Pint of every Bushel of Corn of every Person (not being a Burgess, or otherwise exempted) exposed to Sale in the said Market *nomine Tolnet.* and that the Plaintiff had exposed twelve Bushels at one Market and four at another (he not being a Burgess nor exempt) and that he (*prout* Servant) took the said 16 Pints at the said two Markets, *i. e.* twelve Pints for the twelve Bushels, &c. The Plaintiff demurs, because the Caption in the several Places mentioned in the Declaration are not answered severally, that so it may appear whether the Pints were taken in the Market or out of it. *Per Cur.* the Plea is good: It sufficeth to answer to the taking in the Village where it is alledged. Sir *T. Jones* 207. *Specot* and *Carpenter*.

By Distress for Rent.

The Defendant justifies the taking and severing of Horses fixed to a Cart loaden with Corn, for Rent-Service, and good. *Siderf. fo. 440. Webb and Bell. Vide Cro. Eliz. 7. Tunbrig's Case contra.* But it is agreed, they may be severed, if distrained Damage-Fesant. But an Horse on which a Man is riding may not be distrained for Rent, but for Damage-Fesant it may. *Siderf. 440. 422.* But to Treat of Distresses and what Things are distrainable, belongs not properly to this Treatise.

The Defendant pleads J. S. was seized of the Land in *qua, &c.* in Fee, and demised it to the Plaintiff reserving Rent, with a Clause of Re-entry, and after by his Will devised the Land to the Defendant, and he re-entred for Non-Payment of Rent, *quæ est ead. &c.* The Plaintiff demurs. 1. Because he doth not shew that the Lease made to the Plaintiff is a Lease of the Land in which the Trespafs is supposed to be done. 2. He shews not that he did enter into the Land by the leave of the Executor, which he ought to have done; for though the Land were devised to him; yet he cannot enter without leave of the Executor. *Stiles Rep. p. 65. Matthew and Herle.*

The Defendant justifies by Distress for Rent of the Lessee at Will. The Plaintiff replies, That in *August, i. e.* before the Rent-Day, the Defendant demised to the Plaintiff for Years to begin presently, and that by Virtue thereof he entred. The Defendant rejoins, That there was an Agreement to continue Possession by Tenant at Will till *Michaelmas* next, *i. e.* That he should not enter till after the Rent-day, *absque hoc* that the Plaintiff entered before. *Per Hales,* where the Matter is not traversable without an Inducement,

ducement, the Inducement is traversable: It seems the Lease for Years is a Determination of the Will, because the Lessee takes notice of it. 3 Keb. 207. *Dingsdale and Isles*. And though upon the whole Matter, and by Virtue of the Agreement, it was a Lease by Computation from *August*, and in point of Interest but from *Martinmas*; yet as this Case is pleaded where the Plaintiff acknowledgeth the Lease to commence in Interest in *August*, the Estate at Will was determined. *Raym. 225. mesme Case.*

By Distress for Damage-Fasant.

Trespas for taking Horses. The Defendant justifies for Damage-Fasant. The Plaintiff replies, That before the Trespas supposed, &c. he yoked his Horses and tied them to the Plough, and the Defendant untied them and took them, &c. *Per Cur.* he may well sever them for Damage-Fasant, aliter if it were a Distress for Rent-Service. *Cro. Eliz. 7. Tunbridge's Case. vide Sid. p. 440. Webb and Bell's Case contra, vide supra.*

Vide de hoc sparsim.

Trespas for taking his Gelding, &c. at C. in Com. Norf. and driving and impounding them at a Place unknown, so that they may not be Replevied. The Defendant justifies Damage-Fasant in his Free-hold, and that he impounded them at *Carrow-Abbey*, within three Miles of the Place where he took them. The Plaintiff replies, That *Carrow-Abby* is within the County of the City of *Norwich*, and not in the County of *Norfolk*. The Defendant demurs, and Judgment *pro Def. in B. C.* By the Statute of *Marl. c. 4. and 1 & 2 P. & M. 12.* prohibits the driving of the Distress out of the County upon a Penalty, and he that will take advantage of these Statutes ought to do it by way of

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Action, and by it to entitle the King to a Fine, and not by way of Bar. Also this Replication is ill, and a Departure; for this Action is founded upon Common Law, and by the Replication he will make it good by Statute Law. 3 *Levinz.* 48. *Woodcroft and Tompson.*

In Trespafs for taking an Horse, the Defendant justified for that J. A. was possess of a Close, &c. and that the Defendant as his Servant took the Horse in that Close Damage-Fesant. Pl. Demurs, because the Defendant did not shew what Title J. A. had to this Close. *Per Cur.* it being in Trespafs it is sufficient to say that J. A. was possessed, because in this Case Possession is a good Title against all others; but it might have been otherwise in Replevin, and the Law is plain, That where the Interest of the Land is not in Question, a Man may justify upon his own Possession against a Wrong doer. 3 *Mod.* 14. 132. *Langford and Webber.*

Bar by Amerciaments.

The Defendant justifies that H. was seized of the Manor of &c. and that he had a Leet, &c. and that at the Leet the Plaintiff was presented for having a Pidgeon-House, not being Lord or Parson, and that he was commanded to shut it up, & *deinde habuit notitiam*, and for his refusal was amerced by the Steward, and for refusing to pay, the Defendants as Bailiffs to H. took the Beasts. *Per Cur.* the Notice is sufficient; but the Amerciament ought to have been by the Homage. 2 *Rolls Rep.* p. 3. & p. 30. it was adjudged *pro Quer.* for the erecting a Dove-house is not a Nuisance presentable in a Court Leet. *Vide* 5 *Rep.* 104. *contra.*

Trespafs

Trespas brought for taking away a Cup till he had paid 20 s. The Defendant pleads, That *ad quandam Curiam* he was amerced, and for that the Cup was taken. *Hales*, It doth not appear what Court it is, whether a Court-Baron by Grant or Prescription, if it be by Grant, then it must be *coram Seneschallo*; if by Prescription, it may be *coram Seneschallo*, or *coram Sectatoribus*, or *coram* both. Then it doth not appear that the House where the Trespas was laid, was within the Manor; then he doth not say *infra Jurisdiction* Curie. *Mod. Rep. p. 75.*

Trespas for taking a Bullock and selling it. The Defendant justifies, because at the Sheriff's Tourn held *infra Menssem Pasch. (viz.) 18 Apr. &c.* the Plaintiff was amerced by the Jury for Non-appearance, which was assayed by four of the Jury to forty Shillings, and after at the next Sessions of the Peace (*viz.*) &c. it was certified and ratified by the Justices, whereupon the Steward made a Warrant to him to levy it, and so sold, &c. *Demur, 1.* Because he doth not alledge that the Tourn was kept *infra menssem post Festum Pasch* Stat. 21 Ed. 3. c. 15. 2. The Amerciament ought to be assessed by the Court; for it is a Judicial Act, and shall be assessed by the Assessors appointed. 3. The Amerciament was levied by the Bailiff by Warrant from the Steward, where by Stat. 1 Ed. 4. it's appointed, That no Fine or Amerciament in the Tourn shall be levied unless it be certified at the next Sessions by Indenture, and enrolled, and by Process made from the Justices to the Sheriff. Judgment *pro Quer. Cro. Car. 276. Griffith and Bidle.*

Trespas for the taking of several Goods. The Defendant justifies for several Amerciaments assessed in a Court-Baron, but does not shew any Asserment by the Assessors: Upon which the

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Plaintiff demurs generally. And it was adjudged for the Plaintiff by all the Court for this Cause, 3 Levinz. 19. Conyers and Frank.

In visu pleg' Amerciam. Repl. quod non fuit presentat. Ra. Entr. 606.

Amerciament in Leta pro nocumento. Repl. quod locus in quo est extra præinct. del Leet. Ra. Entr. 606.

Justification in Trans. per distress per un Amerciament in Court-Leet. Tompl. 311, 346.

Vide Plura as to Amerciaments in Courts-Leet, Hundreds, Tourns. Towns. Tab. 284.

CAP.

C A P. XVI.

*Of Justification in Trespas by reason of
Common by Prescription or Grant.*

I Next shall speak to Justifications by reason of Common; but do not intend to handle the Right of Commoning at large, but only give the Cases and Presidents so far as to direct the manner of Pleadings therein; and the like in the adjoining Title of *Chymin* or a Way.

Of Common.

Bar al novel Assign' quant al part Def. confes. Judgment per non sum informat' quant al residue Def. Justifie per Prescription pur Common appurtenant & causa vicenagij. Repl. son tort demesne & traverse le prescription. Rej. & Issue sur le Prescription. Winch. Entr. p. 1085.

Per Prescription pur Common & Common de Pasture pur tous avers levant & couchant, &c. Repl. de son tort demesne & traverse le Prescription. Winch. Entr. 1089.

Pur imparcat' de vach' sans reasonable cause] Bar, le lieu en que est 500 acres de pasture, & que Seigneur de Manor prescribe a tener Court-Leet & Court-Baron, & custom a eslier 4 By-lawmen a Surveier le Commons; queux 4 ont used prendre & imparker tous avers de tiels persons nient ayants common en lieu en que, &c. que fueront troves icy damage-fesant. Et per ceo que la Vach. del Def. fuit en le lieu, &c. Damage-fesant il n'ayant common la ils distreyn & impound. Repl.

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Repl. que W. L. estant seise de meason, &c. a que il prescribes aver Common appartenant en le lieu en que, &c. il demise al. Plaintiff pur un ann, qui enter & fuit possesse & mitt sa Vach' en lieu, &c. pur user son Common. Rej. per maintenance del Bar & traverse de Prescription en W. L. pur aver Common en lieu. Winch. Entr. 1090.

Bar que le & selions gisont en M. field (novelment assign') qui pur chescuns 2 anns ensemble concurrents use d'estre emblees ove blades & chescun 3 anns a giser fallow; & que il prescribe d'aver Common en les 2 Selions chescun ann de dits 2 anns concurrents quant le dit M. field fuit emblee puis barvest, & per tout l'ann quant le dit M. field gisoit fallow, pur que il mitte eins ses avers prout, &c. Repl. son tort demesn, & traverse la Prescription. Rej. Per maintenance del Prescription & Issue. Winch. Entr. 1094.

The Defendant pleads, Que il est impuniable causa Vicinagij per Custom del Country. Winch. Entr. 1111.

Def. plede Distress pur Damage-Fesant per un Lease. The Plaintiff prescribes to have Common. Winch. Entr. p. 1113.

Bar al Novel Assignment by reason of Common. Repl. per Lease pur anns. Et Issue sur le Prescription. Winch. Entr. 1116.

Prescript' pro Comunia Pasture in seperalibus terris ad seperalia tempora pro seperalibus averijs & traverse quod est cul. cum equis. Ra. Entr. 579.

Def. ut Rector Ecclesiæ fuit seistus (in jure Ecclesiæ) de Messuag' & terris quibus Communia pertinet per Prescription. 1 Brown. 371.

Per Common de pasture pertinen. & ad gregem aquand. 1 Browne 370.

The Defendant justifies for that he had Common for all his Beasts Levant and Couchant in the Place, &c. by Prescription, and put in the
said

faid Cattle *utendo Communia*. Issue was on the Prescription, and found for the Defendant. And Exception was taken, That he doth not averr his Cattle were Levant, &c. and so no Judgment ought to be given. Bur *per Cur.* the want of Averment is aided by the Statute of Jeoffails. *Cro. Jac. p. 44. Prance and Tringer.*

A Commoner may not justify by Prescription to dig Clay and take away the Soil to repair the House. *2 Rolls Rep. 308. Shean and Bullen, p. 344.*

Trespafs for chafing the Plaintiff's Hogs. The Defendant justifies, That he did hunt them with a Dog, by the Command of his Master, because the Plaintiff did put them into his Master's Ground to eat Acorns there. The Plaintiff replied he had Common there. The Defendant moved in arrest of Judgment, because the Plaintiff in his Replication hath not answered the Bar; for he prescribes for common of Pasture, and Pannage is no Pasture, and so he hath no Right to the Acorns. But *per Rolls*, if they have cause to eat the Grass, they may eat the Acorns there which are on the Ground. *Stiles Rep. 213. Barnstone and Gale.*

In Trans. pro succisione arborum & subbosci, foditione in solo, & terra project. Arborum & subbosci asportatione & herbæ depast. cum averijs. Justific' per communiam (pro omnibus averijs) pasturæ turbariæ, foditionis terræ ac common este-ver. &c. & fodendo turbas marlerium, &c. & succidend' arbores pro House-bote, Hedge-bote, Fire-bote. 1 Browne. 370.

The Defendant Justifies in Action for Enclosure, and pleads that he had an House there, and made the Inclosure for the enlargement of his Curtelage. The Plaintiff demurs, and took Exceptions to the Plea;

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1. It is not said to be an ancient Messuage. *Per Twisden*, for that reason it is not good. *Windham contra*, being for enlargement of a Curtelage; for the Lord may build a new House for his Herdsmen, and after may enlarge the Curtelage. 2 *Inst.* 476

2. It is unreasonable to enclose two Acres out of three; to which it was answered, That the Quantity is to be considered with the Quality of the Person.

3. It is not averred that sufficient Common is left, to which *Windham* inclined, *Twisden contra*. This is to be averred only where Inclosure is for Improvement of Land, not where it is for the enlargement of a Curtelage. But *Trin.* 14 *Car.* 2. The Plea was agreed by all to be ill, because it is not said that the Messuage was for his own Habitation, or of his Sheperd; for he might build a great Messuage to lett to a Nobleman, who might require a greater Curtelage than the Lord or his Herdsman. Judgment *pro Quer.* 1 *Levinz.* 62. *Nevill* and *Hancerton*.

In Trespafs for the breaking his Close, the Defendant justifies for Common, and prescribes in the Bailiffs and Commonalty of *Derby* for the Beasts of every Freeman of the Village, and upon Traverse of the Prescription the Verdict was given for the Defendant. And after it was moved that the Prescription was not good. *Sed Cur. contra:* and Judgment *quod Quer. nil capiat per billam.*

Trespafs for entring his Close and spoiling his Grass *pedibus ambulando*, and taking and driving his Beast to Places unknown, &c. The Defendant pleads the Place where is a waste Parcel of his Manor, and that the Beasts of the Plaintiff were there intermixed with the Beasts of Strangers, which had not any thing to do there; and because he could not sever the Beasts of the Plaintiff from the Stranger's Beasts, he drove them together to a Pound

Pound within the Waste to sever them, and did there sever them, and drove the Beasts of the Stranger out of the Waste, and left the Plaintiff's Beasts in the Waste. The Plaintiff *quoad* the Plea of the taking and driving the Beasts, he prescribes for Common, and saith, That immediately after the Defendant had impounded the Cattle, the Plaintiff requested the Defendant to deliver his Beasts to him, which he refused. The Defendant rejoins and maintains his Bar, *absque hoc* that *die & loco* alledged by the Plaintiff, the Plaintiff immediately after the impounding requested the Defendant to deliver them. The Plaintiff demurs. *Per Cur.* 1. The Traverse in the Rejoinder of the Day and Place is ill and multifarious. 2. The Replication is ill; for he ought to have traversed the Bar, 1. Either that the Defendant did not leave the Beasts in the Waste after the Severance. 2. Or, That he might have severed them without impounding them. 3. Or *de injuria sua propria absque tali causa*. And then the Defendant in this Issue ought to have proved the Necessity of the Impounding. *Per Cur.* also, the Bar is good without alledging a Custom to drive the Common. But where they use at a certain time of the Year to drive the Common, they ought to prescribe. 3 *Levinz.* 41. *Thomas and Nichols.*

Trespas for taking and detaining his Beasts until 5 *l.* paid for their Deliverance. The Defendant justifies to have a Drift of Common to see if it be not surcharged, and that the Beasts were there surcharging the Common for which he took them and detained them until 5 *l.* paid in Satisfaction of the Trespas. The Plaintiff demurs, and it was said, That Prescription for a Drift of Common doth not warrant the taking a Distress for it unless he had prescribed to distrain also. *Cur. contra.* This is a thing of common Right for Preservation of

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of Common, and gave Judgment *pro Quer.*
2 *Levinz.* 87. *Bromfield and Teigh.*

The Defendant claims Common in *Trigmore-Moor* for Cattle levant and couchant in *Down-Close*. He ought to aver that these Beasts were levant and couchant upon *Down-Close*, and where he ought to prescribe. *Popham* 201. *Jenkin and Vivian.*

Def. justifie come Servant le chaser des avers pur ceo que fuer' damage-fesant. Plaintiff repl. & prescribe pur Common, &c. Def. traverse le prescription, & Issue sur ceo. 1 *Sanders* 220, 223.

A Man prescribed, he was seized, and used to dig Clay in another's Soil to make Pots. It was adjudged void, because whatever Interest is claimed in another's Soil must be annexed in Property to his own. 2 *Keb.* 290. cited in *Hayward's Case.*

The Defendant justified for Common. The Plaintiff replies he hath an House adjoining to the Place in which the Defendant justifies for Common, and that by Stat. *W. 2. c. 46.* he took two Acres to enlarge his Curtelage, not saying it was an ancient House. *Per Cur.* he ought to say it is an ancient House, and for Habitation also, and not only for Pleasure or convenience, as an Hop-Ground or Park is not within the Statute, he must say, it is an ancient House, though the Party makes no Prescription, but only a Privilege, and there needs no Averment that he left sufficient Common. 1 *Keb.* 283, 314. *Hamerton and Nevill.*

The Defendant justifies as in his Free-hold Damage-Fesant. The Plaintiff replies, by Prescription of Common for all Beasts levant and couchant, &c. and avers not that those Beasts were levant and couchant upon the Land; otherwise he hath not sufficiently entitled himself. It's ill upon demurrer,

murrer, but good after a Verdict, by Intendment of *utendo Communia sua*. Cro. Eliz. 558. Corbison and Pearson.

The Defendant prescribes in the Lord for Common for Beasts levant and couchant; and justifies as Servant to the Lord, and entry to see the Cattle that no Damage happen to them, and he *inrando* trod down the Corn. *ibid.* *Per Cur.* It appears that the Cattle were not the proper Cattle of the Defendant, and he doth not say that he put them there, and then he is not Guilty; for a Man may not be Guilty of Trespas with Cattle, unless that they are his proper Cattle, or that he actually put them in the Place where. *Per Cur.* the Plea is ill. There is another fault in the Plea, he doth not aver that the Cattle were levant and couchant upon the Manor, and Form of Pleading, *vide Sanders* 1. 27. Earl of Manchester against Vale:

When the Defendant rejoins and traverseth the Prescription which is found against him, the want of Averment, &c. are aided by the Statute of *Jeofayles*. 1 *Sanders* 227. *Stennel* and *Hog*.

A Commoner may justify for Damage-Fesant, but not have Action of Trespas against a Stranger for feeding on Grass. *Keil. Mich.* 18 H. 7. c. 2.

Trespas for digging Turf. The Defendant pleads he is seized of an ancient House, and prescribes to have so much Turf every Year as two Men may dig in a day as belonging to his Mesuage. The Plaintiff demurs, because he shews not that the Turf was to be burnt in his House, and all Estovers ought to be used in the House; and as it is laid here it might be sold, although he claims it as appurtenant to his House; and a Case was cited, that a Prescription to dig Clay in the Scil of another to make Pots is void. But it was answered and resolved, when the thing is uncertain,

tain, as Estovers, it ought to be applied to the House to ascertain it, but here it is certain enough in it self, (*viz.*) so much as two Men may dig in a day, and Judgment *pro Quer.* 1 *Levinz.* 231. *Haywood and Dunington.*

Trespafs by the Lord of a Manor. The Defendant prescribes as Tenant to have *solam pasturam de un close omni tempore anni.* The Court were divided in C. B. whether the Prescription were good to exclude the Lord, but in B. R. the Prescription was adjudged good. 1 *Levinz.* 253. *Sir Hen. North and Coe.*

Trespafs for taking forty Sheep of the Plaintiff, *ita quod per chafiationem illam* they were much damnified, and one of them died. The Defendant justifies Damage-Fasant in his Free-hold. The Plaintiff replies, and claims Common in the Place where, &c. The Defendant rejoins and justifies by inclosure leaving sufficient Common for all the Beasts levant and couchant on the Tenement of the Plaintiff. The Defendant demurs, for that the Bar was ill in not answering to the dying of one of the Sheep. *Per Cur.* the Bar is good, and he need not; for coming under the *ita quod*, it is not but for Aggravation of Damages, at least it is cured by the Replication over. Judgment *pro Def.* 1 *Levins* 283. *Leech and Midgly.*

Trespafs for taking forty Sheep and chasing them, by reason of which chasing one of them died. The Defendant pleads the Place in which the chasing is supposed was his Free-hold, and that he *leniter* chased them, *qua est ead' transgressio.* The Plaintiff replies, and justifies for Common. The Defendant rejoins by Inclosure. The Plaintiff demurs. It was urged for the Defendant, that the Bar is not good, because he doth not answer to the chasing of the Sheep, for he ought to have traversed it. *Per Cur.* the Plaintiff relies by his Replica-

Replication upon the Common, and waves the chasing the Sheep, &c. and therefore good enough. Judgment *pro Quer.* Raym. 185.

Trespas *inter alia*, for breaking his Close and digging four Cart Load of Stones, and carrying them away, and converting them to his own Use. The Defendant as to all *præter* breaking of the Close and carrying away the Stones, pleads *Non culp.* and as to them he prescribes to enter and dig Stones for the Reparation of his House and Fences, which were out of Repair. On which the Plaintiff demurs generally. It was said the Plea is not sufficient, for that he doth not say he used them for Repairs, or at least *penes se retinet ad reparand.* otherwise it may be he had sold them, tho' at first he dug them and carried them away for such an use. And the Justification was held not good. 3 Levinz. p. 323. in C. B. Danby and Hodgson.

I have not made any References to the old Precedents, because Mr. Townsend is very large in that Title. So in the Title *Prescription per Chimin.* Towns. Tab. 294, 295, 296.

By Prescription, vide Common, &c.

Trespas for taking and carrying away his Cheese. The Defendant justifies for that he was seized in Fee of Chipping Sudbury, and of an ancient Market there every Thursday, and that he, and all those whose Estate he hath, had used to have a Penny for every hundred Pound Weight of Cheese exposed to be sold in the Market, in the Name of Pitching-Penny, and on denial, to distrain; and that for the said Penny for an hundred pound Weight, &c. being demanded and not paid, he distrained. On Demurrer Exception was taken, That the Defendant had not made sufficient Title,

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not

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not having alledged Usage, time out of memory, but only by all those whose Estate he hath : and of this Opinion was the whole Court. Sir Tho. Jones, 227. Goodwin and Brookes.

De Chymin, a Way.

The Defendant pleads for one Parcel he was seized of an House and thirty Acres of Land in C. and prescribes to have a Way over them to his Common in *Barningham* : and for the other Parcel, prescribes that he and all those whose Estate he hath, used to have a Way for Pack-horses unto the King's High Way leading to N. and Issue upon these two Prescriptions, and found *pro Quer.* and good : For though the proper Use of a Way be to some End, and that ought to be shewn; yet if it be only that he had a Way over the Cloſes of the New Assignment, and no Place or End thereof is pleaded for what Cause, or to what other Place, and Issue is taken upon the Prescription and found, the Prescription is good. And though he mention not any Place where the Common lies, yet the Tryal is good; yet it may be intended to lie in *B. Hutton* p. 10. *Coble* and *Allen*. After Verdict it is aided. *Vide Cro. Eliz.* p. 427. *Brag* and *Bunning*.

Trespas quare clausum fregit. The Defendant pleads that the Manor of C. is an ancient Manor, and that *infra dict. Maner.* is a Custom that every Tenant shall have a Way over the Place where, &c. It's an ill Plea, 1. Because it appears not the Place where, is within the Manor. 2. It should be *usi fuer' habere*. *Siderfin Hill.* 16 & 17 Car. 2. *Cornelius* against *Taylor.* *vide infra.*

The Defendant pleads Prescription *pur un drift way; in per & trans clausum quer.* 1 *Brown* 362.

Prescription

Prescription for a Way belonging to a Piece of Meadow of one F. *qui habuit viam pro tenentibus & firmarijs ad cariad. & fugand. a tempore falcationis usq; ver, &c. & averia in utenda via sua casualit' momorder' herbam & contra voluntatem Def. 1 Browne 377.*

Justification al Novel Assignment pur Chymin Rogation-Week. 1 Browne 379. Absque hoc quod est culpabil. ante vel post talem diem.

In Trespas for entring a Close in N. the Defendant justifies *quod Manerium Coldnorton est antiquum Manerium, & quod talis habetur consuetudo infra Manerium quod quolibet inhabitans haberet viam per & trans the said Close to the Ferry.* The Plaintiff demurrs because the Close appears to be out of the Manor of C. *& quilibet inhabitans haberet* is no sufficient Averment, to which the Court agreed; it ought to have been, That every Inhabitant within the said Manor of C. hath had and used a Way over to N. &c. 1 Keb. 836. *Cornelius and Tapor.*

Justificatio quod ultra trans & super præd. clausum de novo assignat' fuer' 3 communes viæ pedestres & quod Def. tempore quo ambulabat in viis præd. Repl. protest. quod non fuere 3 viæ pedestres prout, &c. pro placito quod Def. clausum fregit & herbam ibid. crescen' extra vias præ. pedibus ambulando conculcavit, &c. Rejoind. per manutenentiam. Placito. Surrej. quod Def. clausum fregit extra vias præd. Issue inde. 2 Browne 255.

Def. quod locus in quo, &c. fuit terra vasta, & præscribit pro Stannar' fodere trenchias ad provehend. aquarum cursus ad opera Stannaria quotiescunque operantur in eisdem & dummodo terra mora & vasta vastat' sunt & non clausa. 1 Brown. 369.

Quod quilibet tenens customar. consuevit habere pro se & serviens suis viam tam equestrem, &c. ad carriad. & recarriad. &c. per & trans

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locum in quo, &c. Et quia Quer. inclusit locum in quo, &c. cum quadam janua secat. &c. Def. ut serviens, &c. Januam præd. fregit. Repl. de injuria sua propria, & traxerit le Custom. Rej. quod talis habetur consuetudo. Et Issue superinde. 2 Browne 248, 249.

The Defendant claims a Way from one Village to another by Prescription, and the *Visne* is out of two Villages. Exception was, That there are intervening Places between the two Villages. But *per Cur.* it is sufficient if the *terminus a quo & ad quem* be joined, and the two Villages shall be intended to have consueance whether a Way or not. *Pal. 35.*

Trespas for treading down his Grass, breaking and pulling down his Gate, and entring his Close called the Yard, and breaking his Hedges. The Defendant, *quoad* the breaking the Hedges, pleads *Non Culp.* and for the residue justifies for a Passage by and through a Yard, and that at the time *quo, &c.* there was a Gate put upon the Passage, so that he could not pass with his Beasts, by which he broke and pulled down the Gate, and in passing trod the Grass, *aliquantulum* which is *idem residuum*, of which he complains. The Plaintiff replies, that this is not *idem residuum* of which he complains. The Defendant demurs. It was objected that he may not justify the pulling down and breaking the Gate, not having shewed that it was lockt or nailed so that he could not pass. But *per Cur.* having pleaded that the Gate was set there so that he could not use his Passage, shall be intended locked or nailed, or the Way so straitned so as he could not pass; and the Plea is good: and the Replication so general is idle and vain. 3 *Levinz. 92.* *Sprig and Neale.*

Trespas *quare clausum fregit, & herbam suam depast.* The Defendant pleads, That *J. R. diu ante*

ante the Trespafs, was seized of an ancient Messuage *cum pertinentijs*, and prescribes for Common of Pasture in the Close of the Plaintiff for his Beasts levant and couchant upon the said Messuage *cum pertinentijs* and makes Title to the Wife of R. for her Life, who had entred, & *adbuc seifita existit*, and conveys to himself the said Messuage at the Will of the Wife, and justifies *utendo communia præd.* The Plaintiff demurs, because the Prescription is not good; for Beasts cannot be said levant and couchant upon a Messuage. *Per Cur.* the Prescription is good; for this is not Common *appendant* but *appurtenant*, and such Common is usual in the County of *Lincoln* and other Counties; & *adbuc seifita existit* is a good Averment of the Woman's Life. Sir *Tho. Jones* 227. *Scamler and Johnson.*

In Trespafs for breaking his Close. The Defendant justifies to have a Way by Prescription over the Land in which, &c. for carrying off such Tithes *usque ad Rectoriam de D.* from such a Place. It's an ill Plea, there ought to be *terminus a quo*, & *terminus ad quem*; and the Word *Rectoria*, which ought to be *terminus ad quem*, is uncertain; for it consists of divers things, as Glebe, Tithes, &c. but he ought to have said, the Parsonage-House, or other Place certain. And the Case was, the Rectory consisted only of Tithes, and the Tithes used to be lett to Farm to divers Persons, who have carried such Tithes to their own Houses, and the Defendant is one of the Farmers of the Tithes. By *Wray*, if the Case be so, it ought to be pleaded in this Nature, That *J. S.* is seized in Fee of the Rectory of *D.* and that time out of Mind he and all those, &c. have used for them and their Heirs formerly to have a Way to carry their Tithes from such a Place over the Land where, &c. unto such an High Way,

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and name a Way which is next to the Place where the Trespas was done (suppose he should prescribe to carry them over, &c. to his Barn belonging to his said Rectory, or to the Parsonage-House.)

2 Leon. p. 10.

A Prescription is *stricti Juris*; therefore if one prescribes *habere viam tam pedestrem quam equestrem cum omnibus carriagijs*, by this Prescription he cannot have a Cart-way; it's better to prescribe *habere viam pro omnibus carriagijs* generally, without speaking of Horse or Cart-way. 3 Leon.

13.

The Defendant justifies by a Way. The Plaintiff replies he went out of the Way. It's a good Replication; it is confessed and avoided. Litt. Rep. 45.

The Defendant justifies by Prescription to have a Way over such a Close. The Plaintiff replies, That he drives his Cattle *extra viam*. The Assignment of the Trespas out of the Way is a sufficient Confession of the Way; and the Way shall not be intended through all the Close. Litt. Rep. 180. West and Phillips.

In Trespas for breaking his Close, the Defendant justifies by reason of a Way from his House through the place where, *usq; altam viam regiam in Paroch. de D. vocat. London-Road*. Issue was joined upon the Way, and found for the Plaintiff. It was moved, there was no Issue joined, for the uncertainty of the *Terminus ad quem*, whether this Way should lead, and one that justifies for a Way, if he alledgeth the Way from whence and to which, and that it leads over the Place where, it is sufficient, though he mistake the other mean Passages. But *per Cur.* in regard it is found that he had a Way over the Place where, it is not material to the Justification where it leads, it being
after

after a Verdict, and so cured by the Oxford Act.
1 Ventr. 14. *Clarke and Cheney.*

Trespafs *quare clausum fregit & diversa onera equina* of Gravel had carried away, *per quod viam suam amisit.* It was moved in arrest of Judgment, That the *diversa onera equina* was uncertain, and then mentioned the loss of his Way, and sets forth no Title to the Way, nor sets forth any Certainty. *Per Cur.* after a Verdict yet the Exceptions are material. 2 Ventr. 73. *Blake and Clattee.*

Action for Trespafs done with his Cattle in two Closes of the Plaintiff's, the one called the C. Close, and the other the M. Close. The Defendant pleads the C. Close is next adjoining to the M. Close, and that the M. Close is next adjoining to a Meadow-Close, and that he and all the Occupiers of the Meadow-Close have used *fugare & refugare averia sua* from the Meadow-Close to the M. Close, and from thence to the C. Close; and lays an Estate in himself at Will in the Meadow-Close, &c. The Bar is not good, because the Custom alledged by the Defendant is only to do a Wrong. 3. Bulstr. 326. *Turner and Denning.*

A. hath a Way over B.'s Ground to *Blackacre*, and drives his Beasts over B.'s Ground to *Blackacre*, and then to another Ground beyond *Blackacre*. It's a Trespafs; for by this means the Plaintiff might lose the Benefit of his Land, if the Defendant purchase a thousand Acres next adjoining to *Blackacre*. *Mod. Rep.* 190. *Howell and King.*

By Tishes.

Trespafs for breaking his Close called B. and spoiling his Grass *pedibus ambulando, & cum equis & plaustris*, and taking and cutting his Grass *ad valenciam*, &c. & *feni* of the Plaintiff, viz. 5
P 4 carectat.

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carectat. ad valenciam, &c. The Defendant, as to all *præter fraction. clausi*, and spoiling the Grass *pedibus ambulando, & cum equis & plaustris, Non Culp.* and as to them he justifies, because he is seized of the Tithes of Hay *ex eod' clauso provenien. & quia fenum (videlicet) 5 carectat. feni præd. pro decimis feni ejusdem elevati fuer. seperat.* he entred the said Close to carry away the said Hay, *& pedibus ambulando, & cum equis & plaustris, &c.* spoiled the Grass *dampnum tam modicum quam potuit faciend' quæ sunt ead. &c.* The Plaintiff replys, That the Defendant took the Grass cut by the Plaintiff, and made this into Hay upon the Land, *& asport. 5 carectat. feni* of the Plaintiff *in narratione cepit & asportavit, absq; hoc,* that *fuerunt 5 carectat. feni in clauso præd. pur Tithes seperat.* as the Defendant had pleaded. The Defendant demurs specially, because the Plaintiff traverseth the Quantity of the Hay separated for Tithes, which is not traversable; and of that Opinion was all the Court: For the Defendant having pleaded *Non Culp.* to all *præter* the spoiling of the Grass, and justifies by entry and taking his Tithes of Hay; this is good be the Tithes carried in one or two Carts, and it was lawful for the Defendant to make the Hay upon the Land after it was seperated. Judgment *pro Quer. 3 Levinz. 228. Pain and Bregbam.*

For Estovers and Turbary.

Prescription to have *omnes Spinæ, &c.* to be employed and spent in such a Messuage. This is not properly Estovers; for Estovers is but to Parcel of the Wood. *Yelv. p. 188. Dewcliffe and Kendall.*

Trespas for cutting down four Oaks. The Defendant prescribes *habere rationabile estoveriam suum*

suum for Fewel, *ad libitum suum capiend. in bos-*
cis subboscis & arboribus ibid. crescentibus, and
that *in quolibet tempore anni* but in Fawning time.

The Plaintiff replies, That the Place where,
&c. is within the Forest of, &c. and that the
Defendant and all those whose Estate, &c. *habere*
consueverunt rationabile estoverium suum de boscis,
&c. *per liberationem forestarij & non ad exigen-*
tiam petentis. The Defendant demurs. Exception
was taken to the Bar, because he hath not shewed
that at the time of the cutting it was not Fawning-
time, for at the Fawning-time the Prescription did
not extend to it; and it was held a material Ex-
ception. But the Replication is ill; for he ought
either to have pleaded *Lex Foresta talis est*, &c.
or else he ought to have traversed the Prescription
of the Defendant. Had the Plaintiff in his Repli-
cation shewed *Lex Foresta*, &c. then the Pre-
scription of the Defendant had been answered
without any more; for none can prescribe against
a Statute. Judgment on the Replication was given
against the Plaintiff. 2 Leon. p. 209. *Russel* and
Broker's Case, though the Defendant's Plea in Bar
was naught. *Quod mirum!*

Justifie by Prescription to have Estovers to re-
pair the old Houses or building of new, adjudged
good by three against *Williams*. Cro. Jac. 25.
Countess of *Arundel* versus *Steere*.

Trespas for burning the Plaintiff's Turves.
The Defendant justifies that the Turves were
upon the Land where he had Common (and shews
Title to it). and for Damage-Fasant he burnt the
Turves. The Plaintiff demurs, and had Judg-
ment: for the Defendant may not burn the
Turves for this Cause. Sir T. Jones 192. *Brom-*
ball and *Norton*.

Prescription pur Estovers. Tomps. 318, 327,
329, 410.

Justifica-

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Justification pur Estovers per Prescription.
Winch. p. 1115. vide Cro. 2. 25. Countess of Arundel's Case.

Per Prescription pro Estovers. Repl. Quod liberum tenementum premissorum est in quer. 2 Brown 277.

In Trespas for entring and digging his Land. The Defendant pleads he is seized of an ancient Messuage in D. and that he and all those whose Estate, &c. have had fourteen Days Delf of Turves in the Place where, &c. *tanquam ad Messuag. præd. pertin.* On Demurrer the Barr is ill, because he saith not the Turves were to be burnt or spent in the said Messuage. *Sid.* 354. *Hayward and Cannington.*

Waifs and Estrayes.

Def. justifie captionem equi ut extrabur. infra Precinct. Manerij. 1 Browne 374. *Per Prescript.* Tomps. 420.

An estray Colt may be fettered if he be wild. If the Lord make not Proclamation in convenient time, the Possession of an Estray becomes tortious, and the Lord may not keep him for the Year elsewhere than in the Manor. *Winch. Rep.* p. 67. 124. *Pledall and Gosmore.*

Quod cepit juvenecas ut extrabur. infra maner. in quo ipse habuit extrabur' per prescription. & fecit proclam. earundem in 2 villis mercatorijs per 2 dies, & quod quer. non venit ad clamand. infra diem & annum. *Repl. de injuria sua propria, & traverse le Prescription.* Ra. Entr. 638. Towns. Tab. 298.

Des Inclosures. Bar by Default of Inclosures.

Trespafs in *Great Long Mead* with a *Continuando*. Def. *Protestando* that the Trespafs was not continued *modo & forma*, &c. pleads, That at the time of the Trespafs he was posselt of a Close called *Wood-end* for a certain Term then and yet to come, to a certain Close called *Little Long Mead*, *contigue adjacen'*, and the *Great Long Mead* lies contiguous to *Little Long Mead*, and that the Plaintiff was *tempore quo*, &c. posselt of the said Closes called *L. and G.* for Years, and that the Plaintiff *præd. tempore quo*, &c. *debuit reparare facere & manutenere sepes*, &c. *tam inter le Close vocat. Woodend*, and the Close called *L.* as between *L. and G.* and the Defendant *posuit averia in Woodend* to feed, and avers, That the Plaintiff *tempore quo permisit sepes inter le Close vocat. W.* and the Close called *L. and G. in quo* for default of Reparations *remanere aperte confract. & minime reparat. per quæ*, &c. Two Exceptions to this Bar; 1. The Defendant saith he was posselt of *Woodend*-Close, but doth not say of what Lease and for what Time. *Per Cur.* he need not; the Interest of that Close is not in question, but it's collateral, and inducement: For be he seized by Title or Tort, the Possession of the Land is sufficient to justify his putting in his Beasts. 2. He saith, *Quod quer. debuit reparare*, &c. and shews not by what Title or what Sort, as Covenant or Prescription. *Per Cur. non allocatur.* Diversity, where a Right of Inclosure to charge an Inheritance is in Question, there the Right must be shewn, as in *curia claudenda*, and where it goes only in excuse of a *Transf. hac vice*. *Relv. p. 74. Faldo and Ridge.*

Defendant's

The Law of Trespas.

Defendant's Plea not good: For he pleads a Prescription where it ought to be a Custom, that the Occupiers of the Land ought to make the Fences, and he ought not to prescribe in the Person. *Stiles Rep. 538. Baker and Andrews.*

One had enclosed two Acres of Common (where the whole Common was but three Acres) for to enlarge the Curtelage of his House (without saying it was an ancient House) and so justifies *per Stat. W. c. 46. Per Cur.* it doth not appear that it was for his necessary Reliance, and he may not enclose. *Siderf. p. 79. Nevill and Hamerton.*

H. seized of Bl. that ought to repair against B. yet if the Cattle of A. come through the Lands of B. in Trespas by H. A. cannot plead default of Repair in H. 1 *Keb. 186. in Parnell and Rowe's Case.*

If the Defendant plead this Plea, he must have some Interest in the adjoining Ground, as being Lessee for Years or at Will, or having Common, or having his Cattle there to tack, or having leave to put his Cattle there, and the Cattle must go into the Plaintiff's Ground of themselves.

If he plead there was no good Inclosure, he must shew that the Owner (time out of mind) did use to inclose it, and it will be a sufficient Proof to maintain his Plea, that the Mounds were bad at the time, though it cannot be proved the Cattle went in, for that is presumed. *Dier 365. Bro. Tresp. 136, 148, 192, 255, 345.*

Trespas for entring his Close, and taking and impounding the Plaintiff's Oxen. The Defendant pleads Sir H. V. was seized in Fee of a Close called *Low-Leason*, in *Peplor*, being the *locus in quo*, &c. and demised the same to the Defendant for 99 Years, determinable upon three Lives, and justifies the taking Damage-Fesant. The Plaintiff replies, and confesseth the Seisin of Sir H. V. and the Lease,

but

but further saith, That Sir H. V. was seized of another Close called *Bownes*, adjoining to *Low-Leason*-Close, and a Custom in *Poplor*, that the Occupiers of *Low-Leason*-Close ought to repair the Fences between the two Closes: That the Fences were out of Repair, and that the Cattle went into the Defendant's Close *pro defectu sepium*. Issue on the Custom, and Verdict *pro Quer.* *Per Cur.* the Custom if good is extinguished by the Unity of Possession, and the Custom being laid in the Occupiers is good; or it may be laid in those that have the Inheritance. *Raym.* 192. *Bolus* and *Henstork*.

That the Cattle went out of the High Way for want of Repairs of Fences, is a good Justification; but if they go further into another's Ground, whoever is to repair, it's a Trespass. 3 *Keb.* 388.

The Defendant justifies Damage-Fesant. The Plaintiff Replies, That his Cattle escaped into a Close called *Vicars*, in which he used to have Common by cause of Vicinage, and thence escaped into the Defendant's Grounds, into the *locus in quo*, &c. in default of Repair by the Defendant, who by Prescription ought to repair against *Vicars*-Close. *Per Cur.* this is a sufficient Excuse of Trespass: and so where-ever the Party hath Way or special Privilege, as out of the common High Way into adjoining Grounds, in default of the Owner's repair. 3 *Keb.* 417. *Baynard* and *Smith*. *Vide plures Referentias ad President.* Townsh. Tab. 530.

W R E C K.

Wax wrecked and cast on a Manor, not liable to Tonage and Poundage. *Vaughan Rep.* 159.

Justif. Def. ut Ballivus cepit bona in narratione ut Wreccum Maris. 2 *Browne* 177.

Ra. Ent. 684. *bis.* Title to Wreck pleaded.

De

The Law of Trespafs.

Of Chafes, and Parks, and Warrrens. Vide *supra*.

Trespafs *quare clausum & liberam Warrenam fregit*, &c. The Defendant justifies, the Lord made Coney-Burrows, and the Sheep fell into the Holes, &c. and the Defendant chased the Coneys, and digged down the Burrows, and filled up the Holes. It's not a good Justification; he ought to have confessed or avoided the Trespafs; and the Defendant cannot justify the killing the Coneys, and this Plea confesseth he had a free Warren. 2 *Bulstr.* 116, 117. *Carrill and Pack*.

In Action of Trespafs, *per Cur.* when a Man claims a Warren *infra omnes terras Dominicales*, he cannot extend this into the Land of Freeholders; for none shall enlarge his Charter. *Aliter* where he claims the Warren by Prescription. 2 *Bulstr.* 255. *Fowler and Seagrave*.

In Action sur Stat. de Malefactoribus in Parcis, though the King pardon the Offence, yet the Party hath Remedy for the Wrong. *More* 157.

De *Pischarijs*.

Trespafs *quare Piscatus fuit in seperali Piscaria*. The Defendant saith the *locus in quo* was an Acre of Land covered with Water, which was his Free-hold. Good Plea. 8 H. 8. But *Hobl. Ter. Trin.* 19 H. 7. *case* 11. *dedicit*.

The Defendant justifies in Assault and Battery, as Servant to J. S. because the Plaintiff came to Fish in the several Pischary of his Master. Judgment given *pro Def.* and Error. 1. Whereas the Defendant had intituled his Master to the several Pischary by the King's Letters Patents; he had not shewed that the King was seized of it *in jure Coronæ*, and so it might be the King had no Power

Power to grant it. 2. He doth not shew the Letters Patents as he ought, because he derives a Title by them. *Stiles Rep. 15. Jones and Young.*

A several Pischary *usq; ad filum aquæ* cannot be counted on, but such Evidence might be given of such a Pischary by Meets and Bounds. If the Plaintiff derive a Title as high as the *Abbeys*, he need not shew any Patent from the Crown. *1 Keb. 290. Sir Cbr. Guise's Case.*

The Defendant prescribes *pur un Water-Course pro Piscatione in Stagno.* *Tomps. 323. Vide Townsh. Tab. 299.*

Of Fairs. Toll.

Justification by digging Soil and setting up Hurdles in a Fair. *Sid. p. 291. Popham and Woolcott.*

The Defendant justifies the taking a Cow, That the Bishop of *D.* had a Fair by Letters Patents with Toll, and that the Plaintiff sold Hides, and the Defendant demanded *1 d.* for Toll. It's ill. Here is no Grant or Prescription laid for distraining, and Toll is against common Right. *1 Keb. 342. Harris and Hawkins. Tomps. p. 426. Townsend. Tab. 299.*

In Trespals for driving the Beasts of the Plaintiff the Defendant justifies by Prescription for Toll over such a Manor. *Per Cur.* Toll may be appurtenant to a Manor as well as any other Profit *apprender*, and a thing that lies in Grant cannot be claimed by a *que Estate* directly in it self, but it may be claimed as appurtenant to a Manor, by a *que Estate* in the Manor. *Mod. Rep. 231. James and Johnson.*

Trespals

The Law of Trespass.

Trespass quare Piscis suos cepit in sepeali Piscaria. Verdict *pro Quer.* It was moved that the Plaintiff ought not to have called them *Pisces suos*, unless they had been in a Trunk or Pond. In Action for taking of Coneys in a Warren, he shall not say *Cuniculos suos*. *Sed per Cur.* it might be intended a Stew-Pond, which is a Man's several Pischary, and it shall be intended good after a Verdict. Otherwise upon a Demurrer, by Reason of the Local Property. 1 *Ventr.* 122. *Polexfin* and *Crispin*.

Bar by Ancient Demesne.

[In Trespass *vi & armis*, though the Free-hold come in Debate, yet ancient Demesne is no Plea; the Issue is upon the Tort. *Hob. p. 47.* in *Cox* and *Barnsley's Case*.

In 5 *Rep.* 105. *Alden's Case*. If Trespass be in the King's Court where the Realty comes in Debate, Ancient Demesne is a good Plea. As in Trespass for Trees where the Defendant claims the Free-hold.

But in Trespass whereunto the Defendant upon the new Assignment pleads Not Guilty, and upon special Verdict it is found that the Land in question is Ancient Demesne, and the Plaintiff recovered 40 *l.* in *C. B.* and the Sheriff extended the Land, and good, *Hob. p. 47.* *Cox* and *Barnsley*.

Ancient Demesne is no Plea upon the Stat. 5 *R. 2. c. 7.* though the Free-hold come in debate, *Hob. 47.* because Damages are only to be recovered.

None may plead this Plea but the Terre-tenant. 2 *H. 7. 17. Pl. 1.*

If a Trespass be in the King's Court where the Realty may come in debate, ancient Demesne is a good Plea; as for cutting Trees where the Defendant

dant claims Frank-Tenement: otherwise it is no Plea. 6 H. 4. 1.

Trans. pur asportatione un pecie Corii quod Def. distrinxit ill. pro tolnet. en un faire erect. per Letters Patents. Repl. quod Quer. fuit inhabitans infra villam de antiquo Dominico Coronæ Angliæ tent. & quod præd. pecia Corij fuit de proficuis tenementorum suorum ibid. Rej. Def. maintain son declarat. & traverse quod fuit de proficuis tenementorum. Tomps. 303.

Ancient Demesne pleaded, Tomps. 357. Repl. Fine levyed per quod terres deven. Frank-fee. Tomps. 348. Repl. Quod Clausum in Nar' non continetur in Fine. ibid. Rej. Quod quidam impetravit Breve de recto Clauso de terris præd. & ill. prosecut. fuit in Curia Manerij præd. Ideo non fuer' Frank-fee. ibid.

Q

CAP.

C A P. XVII.

Of Bars in Trespafs concerning Goods and Chattels.

I Shall now fpeak fomethings as to Justifications and Bars in Trespafs concerning Goods, &c. and they are

Bars in Title, or *quasi* Title, as

Property,	}	Impignoration,
Sale,		Allowance by Law,
Gift,		By Customs or
Delivery in Satisfaction,		Sequestrations.

Or else Justification by way of Excuse, as

{ For Necessity,
{ Execution of Law.

By Property.

Quod Def. *possessionat. fuit de bonis & dat colore, &c. Repl. & traverse quod proprietas fuit* Def. Ra. Entr. 632.

Quod proprietas bonorum fuit Quer. & H. qui dedit purpartem suam Def. Ra. Entr. 653.

Of Property and Possession. *Vide Sparsim per tot.*

Quod proprietas a veriorum & bonorum fuit cuidam J. qui ea deliberavit custodiend. M. nativo quer. extra cujus possession quer. ea cepit. Repl. quod proprietas inde fuit prædict. M. & traverse quod

quod proprietas inde fuit prædict. J. Ra. Entr. 637. vid. Ra. Entr. 606.

Quod proprietas a veriorum fuit Def. & non Quer. Hern 676. Ra. Entr. 568, 614.

Transf. de bonis capt. *quod* J. possess. de bonis accommodavit ea Quer. pro mense. Repl. proprietas bonorum fuit Quer. & traverse *quod* proprietas fuit J. Ra. Entr. 614, 632.

Vide plura Ra. Entr. 637, 646, 653.

By Vendition.

Quod Quer. vendidit bona Def. Repl. Non vendidit Ra. Entr. 675.

Quod D. possessionat. de equo vendidit eum Def. in aperto mercato. Repl. *Quod* T. Possessionat. de equo vendidit eum Quer. & traverse. Ra. Entr. 675. Vet. Intr. 100.

Quod proprietas equi fuit Def. quousq; fuit capt. per malefactores ignotos, & qui postea venit ad manus Quer. extra cujus possessionem Def. illum cepit. Repl. *Quod* Quer. emebat eum in aperto mercato, & solvit tolnerum pro eod. Ballivo Ville. Up. B. 151.

In Trespass, if the Defendant plead a Vendition in Market overt, this is good without giving Colour, though he saith a Stranger was posselt of these as of his Proper Goods; contrary to 12 Ed. 4. 5, 6. 10 Rep. 90. b. *Liford's Case*. 1 Rolls Rep. p. 273. *Bisse and Tiler*.

In Trespass the Defendant pleads he bought the Goods in Market overt of one J. O. The Plaintiff replies, the Sale was by Covin between the Defendant and J. O. generally, without shewing any thing especially of the Covin, and good. *Plowd. Com.* 46. a. 55. a. *Wimbish and Talboys*.

The Law of Trespafs.

Quod Quer. per Servient. vendidit averia Def. qui ea abduxit. Repl. De injuria propria, & traverse le Sale. Ra. entr. 675.

Trespafs for taking away his Cattle. The Defendant pleads he bought them in a Market overt. Demur, because the Defendant doth not shew what Day the Market was kept, nor whether it were out of *Lent*, according to the Patent for keeping of the Market. This ought to have been averred in the Plea, *per Cur. Stiles Rep. p. 113. Marshall and Porter.*

Per Done.

Quod Quer. dedit vinum Def. per quod cepit. Repl. De injuria sua propria, & traverse le Done. Ra. Entr. 636.

Pro bonis asportat. The Defendant makes Title to himself as Executor, and gives Colour to the Plaintiff by a former Will. Repl. *Quod non fecit tale posterius Testamentum, pro placito que le Testator done eux a lui, & issue sur le done. Winch. Entr. p. 1115. Ra. Entr. 641.*

Done pleaded by S. Repl. That J. S. died possessed, and the Plaintiff administered, &c. and traverse *quod S. dedit Def. Ra. Entr. 637. Vide plus in Towns. Tab. 293.*

Bona deliberat. ad custodiend.

Quod Proprietas bonorum fuit cuidam J. qui ea deliberavit custodiend. M. extra cujus possessionem. Quer. ea cepit. Ra. Entr. 637; 640, 653.

Per Delivery in Satisfactione Debiti.

Quod Quer. indebitat. Def. in 20 l. deliberavit bona Def. in satisfactione debiti. Repl. de injuria sua

sua propria, & traverse le Delivery. Ra. Entr. 614, 615.

In Trespafs it's a good Plea to the Action, That the Plaintiff delivered them to him. 2 Ed. 4, 5. The Plaintiff in 45 Ed. 3. replies, That the Defendant took them tortiously.

Quod deliberavit B. 14 l. solvend. A. cui villas dedit. Repl. quod Quer. non deliberavit ei denarios. Ra. Entr. 614.

De domo fract. & 30 l. asportat. Bar quod Def. vendidit terras Quer. pro 30 l. solven. super requisition. & Quer. requisivit Def. intrare domum ad recipiend. &c. Ra. Entr. 619.

Per Impignorat?

Quod Quer. per Uxorem impignoravit bona Def. pro Denar. ei antea accommodat. per Def. Repl. de injuria sua propria. Up. B. 191.

It is a good Plea, 21 H. 7. 13.

If an Horse be in an Inn-Keeper's Hands he may detain him for his Meat; but if he be once out of his Possession, he cannot justify the re-taking of him in Trespafs. *Aliter* if an Agreement be, As, take this Horse till I satisfy you 10 l. for by this he had special Property, and as a Pawn. 2 Rolls Rep. 438. *Rosse and Bramstead.*

If one Pawn a Gold Chain for Money delivered at the same time, if Action of Trespafs is brought against the other for the Chain, the Defendant cannot plead that the Plaintiff licensed him to take the Chain and retain it till the Plaintiff had paid the Money; but he ought to say, *impignoravit* the Chain to him. *Pl. Com. 542. a. 5. H. 7. 1.*

*Trespass for Escripts and Bar. Vide supra
Tit. Tort al Biens.*

Trespass *quare vi & armis* for cancelling a Deed. The Plaintiff in his Declaration shews, That the Defendant was seized in Fee of Lands, and of this did infeoff J. S. and his Heirs with Warranty, reserving Rent; and that afterwards the Defendant did by his Deed bargain and sell the said Rent to the Plaintiff, for the cancelling of which Deed (the which the Plaintiff *casualit' amissit*) this Action is brought. The Defendant traverseth the Grant of the Rent. *Per Cur.* the Traverse is naught, being but Conveyance to his Action: But because the Plaintiff hath not shewed in his Declaration that he ever was possessed of the Deed, *querens nil cap. per billam. 1 Bulstr. 214. Suckfeld and Constable.*

Quod pater Def. seistus de Manerio dedit illud Def. & Uxori in talio, & dedit ei pixilem cum chartis pro conservat. status. Rep. Quod pater dedit illud Quer. & traverse quod dedit Def. Ra. Entr. 84.

By Allowance of Law.

In Trespass the Case was, Lessee for Life of an House and Land dies, his Executors suffer his Cattle to go there for six Days after his Death, and then removed them: and justifies for that time, averring, That for that time they could not procure any other Land or Place to put the Cattle in. Judgment *pro Def.* for the Law allows a convenient time to remove them. *Cro. Jac. 204. Stodden and Harvey.*

But in Trespass for the taking and carrying away of a Dyer's Fatt. On special Verdict it was found

found that the Sheriff attacht it for debt, &c. being fastned to the Wall of the House, and delivered it to the Defendant. *Per Cur.* it cannot be attacht: If a Furnace be fixt *in medio domus* it is removable, otherwise if fixt to the Walls; and though the Plaintiff hath it by the Delivery of another yet he was present and took it, and so was an immediate Trespasor. *Cro. Eliz. p. 374. Day and Bisbitch.*

Bar by Customs by Law.

Per perambulation' Parochia. Ra. Entr. 617. Co. Entr. 651.

Def. amovit tegulas domus Quer. ad reparand' gutturam secund. consuetudinem burgi. Ra. Entr. 619.

Optimum animal pro mortuario. Up. B. 188.

The Defendant pleads *Prisage* of Wines *per Custome del terre.* The Plaintiff replies *de son tort, absque hoc* that there was any such Custom. *2 Bulstr. 250. Kennicott versus Boyen.*

Justificatio pur chaser un hare ove dogs inter Mich. & Ashwednesday per custom del County, & travers le transf. al ascun auter temps. 1 Browne 365.

By Letters Patents.

In Trespas for taking away Goods. The Defendant justifies, That at the time of the Trespas supposed he was Mayor of the Town of C. and that the King granted to the Mayor and Commonalty, and their Successors all the Goods of Men out-lawed within the same Village, and that the Plaintiff was out-lawed. A good Plea, without shewing the Letters Patents. *Plowd. Com. in Partridge's Case. fo. 81. b. for they belong to the*

The Law of Trespas.

Mayor and Commonalty. *Vide plus de hoc sparsim.*

By Order of Commissioners of Sewers.

Trespas for taking and impounding a Mare till the Plaintiff pays 10 l. The Defendant justifies he distrained her by virtue of an Order of Commissioners of Sewers, for a Tax assessed by them on the Plaintiff. The Plaintiff demurs. 1. It appears not that the Commissioners had Authority, for it ought to be done by six. 2. It appears not here they were all of the *Quorum*, as they ought. 3. There appears no fault in the Plaintiff why he should be taxed. 4. The Number of the Acres of Land doth not appear, upon which the Tax was laid. 5. It doth not appear that the Land taxed did lie within the Jurisdiction of the Commissioners. *Stiles Rep. 178. Bungy and Lee.*

Bar by Sequestration.

In Trespas for taking away four Loads of Wheat. The Defendant justifies, That the Plaintiff is Rector, &c. and so bound to repair the Chancel, and it being out of Repair, the Bishop (after Monition to the Plaintiff to repair the same) had granted a Sequestration of the Tithes of the Rectory, and the Defendants being Church-Wardens, had taken them into their Hands. The Plaintiff demurs. They ought to aver, that they did not take more into their Hands than was sufficient for the Reparation thereof. But of the Matter in Law, *quære. Mod. Rep. 259.*

A Sequestration out of Chancery may be pleaded in Bar to an Action of Trespas at the Common Law; the Court of Chancery at *Westminster* prescribes to grant such Process. *Mod. Rep. 259.*

Justi-

Justification in Trespafs concerning Goods and Chattels, partly by way of Excuse, and Forms of Pleading.

Necessity.

As if Passengers in a Barge cast the Goods over-board in a Tempest, it is justifiable. *Co. 12 Rep. Mouse's Case. 2 Rolls Abr. 567. 2.* But if the Barge be surcharged, The Owners shall have remedy against the Ferry-man.

Beasts of the Forest come into my Land, and I chase them with a Dog and recall him, yet he pursues them into the Forest and kills them, I shall be excused. *4 Rep. 38. b. Tiringham's Case.*

If my Dog Chase and kill Cattle without my Incitation, *Non Culp.* is a good Plea in Trespafs. *Dier fo. 29. Pl. 195.*

Trespafs for assaulting and killing the Plaintiff's Mastiff. *Vide prius.*

If my Sheep are mingled with others, I may chase all the Sheep, to sever my Sheep, but not drive them away. *Latch. p. 13. Cro. Jac. 568. vide 2 Rolls Rep. 163.*

Trespafs of Assault, Battery and Wounding of the Plaintiff's Eye by the shooting a Gun charged with Powder and Hail-shot, by which he lost the sight of his Eye. The Defendant saith *Action non*, because he is, and at the time of the Trespafs was an Officer for the collecting Hearth-Money, and for the better discharge of his Office, and the more sure keeping of the Money collected, he carried Fire-Arms with him, and having one of the Pistols in his Hands, and intending to discharge it, *ne aliquod dampnum eveniret*, he discharged it (*ne mine in opposit. vis. existen.*) and whilst he discharged

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charged it, the Plaintiff casually *viam illam præterivit & si aliquod malum ei accideret, hoc fuit contra voluntatem* of the Defendant, *Quæ est eadem* Trespafs. Per Cur. the Plea was insufficient; for in Trespafs the Defendant shall not be excused without inevitable Necessity, which is not shewed here. Also the Defendant doth not traverse, *absque hoc, quod aliter, seu alio modo*. Sir T. Jones 205. Dickinson and Watson. Vide Hob. 134.

Pleading by way of Excuse or Mistake.

Trespafs for breaking his Close called the *Balk* and the *Hade*, and reaping of his, &c. and carrying it away. The Defendant disclaims any Title to the Lands of the Plaintiff, but saith that he had a Baulk and an Hade adjoining to the Baulk and Hade of the Plaintiff; and in sowing his own Land he involuntarily and by mistake sows some of his own, &c. upon the Plaintiff's Baulk and Hade, intending only to reap the, &c. growing on his own Baulk and Hade, and carried them away, *quæ est eadem, &c.* and that *ante emanationem brevis* he tender'd to the Plaintiff two Shillings in Satisfaction, and that this was sufficient amends. The Plaintiff demurs, and Judgment *pro Quer.* For it appears that the Fact was voluntary; and his Intents are not traversable, neither can be known. 2 Levinz 37. Basely and Clarkson.

In all civil Acts the Law doth not so much regard the Intent of the Actor, as the Loss and Damage of the Party losing.

Trespafs *quare clausum fregit, & pedibus ambulando* in six Acres. The Defendant pleads he hath an Acre lying next to the said six Acres, and upon it a Hedge of Thorns; and he cut the Thorn, and they (*ipso invito*) fell upon the Plaintiff's Land, and

and the Defendant took them off as soon as he could, which is the same Trespafs: and adjudged for the Plaintiff. For though a Man doth a lawful thing, yet if any Damage thereby fall to another, he shall answer it if he could have avoided it.

A Man shoots at Butts and hurts another Man unawares, Action lies. If I have Land through which a River runs to your Mill, and I lop the Sallows growing on the River side, which accordingly stop the Water so as the Mill is hindred, Action lies. If I am building my own House, and a piece of Timber falls on my Neighbour's House, and breaks part of it, Action lies. If a Man assault me, and I lift up my Staff to defend my self, and in lifting it up hit another, an Action lies by that Person; and yet I did a lawful thing. And the Reason of all these Cases is, because he that is damaged ought to be recompenced. *Aliter* it is in Criminal Cases; for there *actus non facit reum nisi mens est rea*. Raym. 422, 423.

One knowing that Execution would be made on his Goods, procures J. H. by covin to set his Cart in the Yard, to the Intent that the Bailiff should take it in Execution, so as to have Trespafs against him; and the Bailiff does take it, and after he knew it sent back the Cart; yet J. H. brought Trespafs. Chief Justice, The Bailiff may plead the Fraud in Excuse. *Palm.* 395. *Grome* and *Grome*.

For the Execution of Law-Processes.

Vide supra Justif. for Entry into Land.

The Defendant as Bailiff justifies by Warrant in Court-Baron on Recovery in *Assumpsit*, not shewing the Cause thereof to arise within the Jurisdiction of the Court. It's ill. So in such Inferior Courts to say *taliter processum fuit* till the Defendant

The Law of Trespafs.

dant had Judgment and Execution. 1 *Keb.* 840. *Hoyland* and *Bacon*.

In trespafs of taking Cattle, the Defendant pleads recovery in the County Court of *York* of Costs and Damages in several Promises generally, and that the Defendants as Bailiffs, by *Fieri Facias* took the Cattle. *Per Cur.* this is no Bar in any Court without the particular Original Suit, &c. Judgment *pro Quer. sur Demurrer.* 2 *Keb.* 669. *Broadbelt* against *Peters*.

Trespafs for entring a Brewhouse, and taking Goods. The Defendant justifies for the Duty of Excise on 22 *Car. 2. cap. 23.* on Order by Commissioners after Information, and that they informed *A. B.* and *C.* Justices of the Peace, and that the said Justices did make no determination. Several Exceptions were taken, which (because it is upon a late Statute) I shall set down. 1. They do not say, That they nor any two of them, for the Statute gives Power to two to do it. 2. It's not said these are the next inhabiting Justices. 3. It's not averred that the Justices were not Commissioners. 4. The Sub-commissioners have Power to determine Penalties and Forfeitures, and this Information is for the single Duty, and so not within their Jurisdiction. 5. It was said, That on default of the Justices in not determining, the Defendant informed *D.* and *E.* Sub-commissioners, and saith not how or in what Place, which is traversable. 6. The Defendant justifies continuance in the House fourteen Days, which is ill without Licence: Judgment *pro Quer.* 3 *Keb.* 670. 681. *Dashwood's Case*.

Trespafs for taking away a Mare. The Defendant pleaded as the King's Bailiff he by Precept out of the Court of *P.* to make Execution, made it on *Levari fac.* and to bring the Money into the said Court, adjudged for the Plaintiff there. *Per Cur.*

Cur. he ought to shew the Jurisdiction of the Court, because he justifies as Bailiff of an Inferior Court; and it must appear the Court hath Conusance of the Cause, otherwise he cannot execute their Precept. 1 *Keb.* 53. *Crofts* and *Wilkinson*.

Trespas for taking his Beasts. The Defendant Justifies by Plaint levied in the Hundred Court by the Plaintiff against *J. S.* upon which *taliter processum fuit*, that the Plaintiff was nonsuited, and Costs taxed, and a Precept to levy, by which he took the Beasts, and traverseth that he was guilty *ante deliberationem Præcepti*, or after the Return, upon which the Plaintiff demurs. Exceptions:

1. This way of pleading a Judgment in Inferior Courts is not allowable. *Sed non allocat.* it is good enough setting out the Plaint levied; but he ought not to begin at the Judgment. *Ideo considerat. fuit.*

2. The Execution in the Hundred-Court is by *Distringas*, not by *Levari fac.* *Sed non allocatus* where the Books cited on the other side speak of a *Distringas*, it is intended of a *Levari fac.* for a *Distringas*, and so *in infinitum*, would be endless in an Execution.

3. The Traverse is not good. Issue upon it would make a Jeofail; for he had taken Execution before the delivery of the Precept to him after the *Teste*, this had been Good. Therefore the Traverse ought to have been before the *Teste* or after the Return; *sed non allocatur*, for the Traverse is to the Prejudice of the Defendant himself, in taking it more narrow than he need, not to the Prejudice of the Plaintiff.

4. There is not any Statute that gives Costs in this Case but 23 *H.* 8. and 4 *Jac.* 1. and these are where the Plaintiff is nonsuited after Appearance; and it doth not appear here that there was any Appearance. *Sed non alloc.* no Advantage shall be taken

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taken of this upon Pleading, but by Writ of false Judgment, and the Judgment shall be intended good until it be avoided. 2 *Levinz.* 81. *Doe and Parmiter.*

Trespafs for breaking his House and taking his Goods, against the Bailiff and Lessor in Ejectment. The Bailiff pleads an *habere fac. Possession.* and Warrant upon it, and so justifies. The Lessor pleads *Non Culp.* The Plaintiff demurs upon the Plea of the Bailiff, because he does not shew any Judgment upon which the *Habere fac. Possession.* was founded. But *per Cur.* the Plea is good; for the Sheriff and his Bailiffs are bound to obey the King's Writs without enquiring after the Judgment. But if the Party himself had justified it, he ought to have pleaded the Judgment as well as the Writ; and Judgment *pro Def.* 3 *Levinz.* 20. *Cotes and Nuttball.*

Trespafs *vi & armis* in the County Palatine-Court of *Lancaster.* The Defendant pleads in in Bar a recovery for the same Trespafs in a Court-Baron, upon which the Plaintiff demurs. And *Wild* Chief Justice of the Assize at *Lancaster*, on adjournment to his Chamber, held this pleadable in Bar. 6 *Rep.* 45. a. *contra*; and 5 *Rep.* 62. a. is not pleadable in Abatement: But Judgment after was given *pro Quer.* For Trespafs *vi & armis* lies not in Inferior Courts; and therefore the Judgment there, if it be *vi & armis* is void, if not *vi & armis* it is not the same Trespafs. But he held *ut supra*, That Judgment in an Inferior Court is pleadable in Bar in a Superior Court; and he also held it pleadable in Abatement, if it be for the same thing. 2 *Levinz.* 93. *Atkinson and Woodbarr.*

As for Justification for breaking open an House, the Sheriff upon a *Fi. Fac.* in case of a Subject, cannot break open the House of any Man to do Execution;

Execution; and a Diversity was taken and allowed *per Cur.*

When an Execution is lawfully commenced, there the Sheriff may break open an House. *Aliter* when it is Legally commenced; as when the Door is open and they enter lawfully into the House, then he may break open inner Doors, which he might have prevented if he had lockt the Door against the Entry of the Sheriff. *Palmer 52. White and Wiltshire.*

Trespafs for taking of his Cattle. The Defendant justifies by Virtue of an Execution in an Action of Trespafs brought in an Hundred-Court. The Plaintiff demurred.

1. The Inferior Court, not being of Record, cannot hold Plea of a Trespafs *Quare vi & armis, & contra pacem. Sed non alloc.* For Trespaffes are frequently brought there, and the Plaintiff may declare either *vi & armis*, or *contra pacem*.

2. The Defendant reciting the Proceedings below saith, *Taliter Processum fuit*; whereas he ought to set forth particularly all that was done, because not being in a Court of Record, the Proceedings may be denied and tried by a Jury: But the Court inclined it was pleaded well enough, and that it was the safest way to prevent Mistakes. But if the Plaintiff had replied *de injuria sua propria*, that had traversed all the Proceedings. *2 Mod. 102. Lane and Robinson. Vide as to the Taliter processum fuit, 2 Mod. 195.*

C A P. XVIII.

Of Justifications in General, and Discontinuance by reason of some Omission in the Plea.

THE Defendant ought to answer and make his Justification in the same manner as the Plaintiff declares against him. The Plaintiff declares that the Defendant *intravit & fregit clausum suum*, and drove away his Cattle. The Defendant justifies *quoad intrationem effugationem*; and saith nothing *ad fractionem*; therefore it's not a good Justification. 1 Bulstr. 64. *Prance versus Tuckle.*

Trespafs brought for breaking a Ship and taking away the Sails. The Defendant Justifies by Warrant out of the Admiralty, by which he entred the Ship and took away the Sails. *Obj.* The breaking is not answered. But *per Cur.* it's good enough; for the Entry is a breaking in the Law. *Latch. p. 188. Creamer and Toakely.*

Trespafs for Assault, Wounding, Taking and Imprisoning. The Defendant as to the Assault and Wounding pleads *Non Culp.* and as to the Caption and Imprisonment, he Justifies. *Per Cur.* here are several Assaults; one in the Wounding, and one in the Taking; and in the Justification he hath left out the Assault. Upon Demurrer the Plea is ill, and all discontinued. 2 Bulstr. 335. *Wilson and Dodd.* 4 Rep. 62. *Harlakenden's Case.* 1 Rolls Rep. 135. *mesme case.* 1 Rolls Rep. 176. *vide Def. quoad part. pleads non culp.* and *quoad others* (but omits some, as the Trespafs *de arboribus*) justifies

justifies and demurrer joined, all is discontinued.

4 Rep. 62. *Harlakenden's Case*.

Trespas for entring his Close and tearing his Planks. The Defendant justifies by Force of a Custom, That all the Inhabitants of N. time out of memory, &c. have used to wash their Cloaths in the said Close, and beat the Cloth upon the said Planks, and demurs; and adjudged against the Defendant, for that no answer is made to the tearing the Planks. *Coke* doubted if the Custom be good. And yet the Inhabitants may prescribe to have a Way to Church, but not to have Common. 1 *Rolls Rep.* 216. *Bawles and Norris*.

Trespas for chasing of his Sheep, Hogs and Oxen. The Defendant saith, as to the Hogs Not Guilty; and for all the rest of the Trespas, except the Oxen, he justifies, and saith nothing of the Oxen. And at *Nisi prius* found *pro Def.* the Defendant had Judgment; for this Omission is but a Discontinuance of this Part of the Action of Trespas only for them, and the Verdict shall stand good for the Residue *per Stat.* 32 H. 8. and 18 Eliz. which aid Discontinuances. 2 *Rolls Rep.* 161. *Jennings and Plaister*.

By *Chamberlaine*, Justice, in Demurrer Discontinuance of Part is Discontinuance of all; but otherwise when they plead to Issue in Trespas. 2 *Rolls Rep.* p. 390. *Bray and Fisher*.

Action is brought for Trespas *cum equis, bobus, vaccis*, &c. and he justifies for two Horses, and speaks nothing of the Residue. It's an ill Plea. *Cro. Jac. p.* 27. *Sir F. Thorne* versus *Lassells*.

Trespas of Assault, Battery and Imprisonment till the Defendant paid a Fine. The Defendant justifies the Imprisonment by a Warrant whereby he took the Defendant in Execution till he paid; and to the rest pleads Not Guilty; and not answering to the Fine, which seemed to be a
R distinct

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distinct Trespas, not depending on the Execution, it had been ill, but that it was held to be within the Not Guilty pleaded to all the rest. *Cramp* and *How* cited in 1 *Keb.* 205. *Prideux Case*.

Not justifies for the whole time.

Trespas is alledged to be 8 *May*, 43 *Eliz.* with a *Continuando* unto 25 *June*; and the Defendant justifies from the 8th of *May* unto the aforesaid 20th Day of *June*, and so he speaks nothing of the four last Days. *Cro. Jac.* p. 27. Sir *J. Thornell* versus *Lassells*.

Trespas of Assault, Battery and Imprisonment *ultimo die Octob.* 6 *Car.* The Defendant justifies, That 13 *Aug.* 6 *Car.* by Warrant from the Sheriff on *Supplicavit* out of Chancery he arrested the Plaintiff 21 *Sept.* The Plaintiff confesseth the Writ, Warrant and Arrest the 21th of *September*, and shews he found Sureties, and that the Defendant *postea* (*viz.*) *prædict. primo die Octob.* 6 *Car.* assaulted and imprisoned him, &c. *Concil. pro Quer.* moved, That the Plea was not good, because he doth not answer the time in the Declaration, *viz. ultimo die Octob.* neither by Answer nor by Traverse. But *per Cur.* the Justification being by an Act in the same County, and justifying all the Time in the Declaration, although it doth not agree with it in the Day; but concludes *quæ est ead. transgressio* is good enough. *Cro. Car.* 228. *Tyler* and *Wall*.

C A P.

C A P. XIX.

I come now to speak of other Pleadings and Bars in Trespas, having handled the nice Title of Justifications and Excuses at large; and they are by Concord, Arbitrament, Amends tendred, &c. and the proper Pleadings thereon; with the Reference to the particular Forms of Pleading that are useful.

Bar per Concord.

BAR al novel Assignment, quant al part non culp. quant al residue Def. pleads Concord. Winch. Entr. 1075.

Bar al novel Assignment, que le Plaintiff per Agrément receive Satisfaction pur tous Trespas fait devant temps spécifie en le Count, & traverse son esteant culp. d'ascun Trespas puis. Replic. protestando nul tiel concord, pur Plea le Plaintiff maintain son Count. Winch. Entr. 1076.

Plead que un des Defendants payed al quer. 20 s. in pleine Satisfaction & Discharge de Trespas pur luy mesme & les deux auters. Winch. Entr. p. IIII.

Concord per mediationem amicorum pleaded, & quod Def. daret quer. lagenam vini quater. Ra. Entr. 627.

Quod trans. fact. fuit per Def. & G. inter quel G. & Def. habebatur concordia quod, &c.

Quod Def. deliberavit oblig. al. un auter & fecit alia pro quer. in satisfact. Trespas. Tomps. 301.

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The Defendant pleaded an exchange between him and the Plaintiff of Lands which were adjoining, and that upon the Exchange *concordatum fuit* between the Plaintiff and Defendant, That the Plaintiff should make the Fences, &c. This Agreement cannot be a Bar in this Action; but the Defendant is put to his Action on the Case on the Promise. *Cro. Eliz. p. 709. Sir Andrew Newell versus Smith.*

The Defendant pleads Concord, that he should pay Money to the Plaintiff, and make certain Windows for him, and shews that he paid the Money accordingly, but says nothing of the Windows. Ill Plea; for the Concord is entire, and he had not alledged Performance of the whole, and he hath no remedy to force him. *Plowd. Com. fo. 11. b.*

Accord with Satisfaction is a good Plea in personal Actions where Damages are only to be recovered. *4 Rep. 1. 6 Rep. 44. in Blake's Case.*

Concord Executory no Bar in Trespas; for a Tort is done and not denied, and ought to be answered with a Recompence, and the Concord Executory is no Recompence in Fact.

In Trespas the Defendant saith it was agreed between the Plaintiff and him, That whereas there was a Debate between the Plaintiff and the Lord Gray, that if the Defendant did his Endeavour to agree them, that then, &c. and saith he did his Endeavour so that they are agreed. It was held no Plea. If he said, He did his Endeavour at his own Charges, it had been good; for there is a recompence then. *Plowd. Com. 5. b. 6. a. in Reniger and Fogassa.*

The Defendant pleads an Accord to give a Judgment in the Sheriff's Court, and pay 50*s.* and that he gave the Judgment and tendered the 50*s.* The Plaintiff demurred, and Judgment for the

the Plaintiff. 2 Keb. 534. *Hall and Seabright.*

The Defendant pleads a Concord to pay 3 l. and a Promise to pay the Plaintiff's Bill when delivered; and avers that he had paid the 3 l. and did then and there promise to pay, &c. *Per Cur.* this Promise or any thing in Action is no Accord as to pay and release, because on refusal the Party cannot compell the Release; but this might be pleaded by way of Discharge, but not of Bar. 2 Keb. p. 690. *Cock against Hunny Church. Raym.* p. 203. *mesme Case.*

Narr. de clauso fract. & cuniculis occisis. Accord pleaded in Bar ove le warrener & accept denar. solut. per quer. Tomps. 387.

The Defendant pleads Concord in Bar, but saith not with Satisfaction; and as it was pleaded, it was not said to be for the same Trespafs. The Plea is ill, if the Plaintiff had demurred to it; but after Verdict it is aided by Stat. 32 H. 8. of Issues misjoined. *Cro. Eliz. 778. Dighton and Bartholomew.*

The Accord must be in the lifetime of him that did the Wrong.

If the Accord be done by a Stranger, it is good. *Dier 356.* if the Party to whom the Wrong was done did accept it. 9 Co. Rep. 79.

If the Trespafs be done by many, and the Accord by but one, 'tis a good Bar for the rest. 9 Rep. 79.

Tender of Money without Payment of it will not be a good Plea. *Old N. B. 102.*

If the Parents or Friends agree with him that hath the Wrong for the Amends, and they perform and he accept it, this is as good as if it were by the Parties themselves. *Fitz. Bar. 106.*

By Arbitrament.

The Defendant pleads an Arbitrament in Bar; that the Defendant should pay to the Plaintiff 20*l*. The Plaintiff demurs, because he doth not alledge a Place where the Submission was, and doth not alledge Performance of the Arbitrament, and doth not answer to the *vi & armis*, and adjudged an ill Plea. *Cro. Eliz. p. 66. Hare and Gorge.*

Trespas may be barred by pleading of a former Arbitrament with a special Averment. *Hobart. p. 50.*

Arbitrament pleaded in Bar, and traverse *que est culpable puis l'Arbitrament fait.* *Tompf. 139. Repl. & issue sur traverse.*

By Amends.

In all Actions *quare clausum fregit*, if the Defendant do tender sufficient Amends before the Action brought, and in his Plea to the Action disclaim to make any Title or Claim to the Land, and the Trespas be by Negligence or Involuntary, by this (being proved) the Plaintiff will be Barred. *Stat. 21 Jac. c. 16.*

If a Man bring Action of Trespas for taking away his Beasts or other Goods, tender of Amends sufficient before the Action brought, is no Bar; because he that tendered the Amends is not Owner of the Goods, but a Trespasser, whom the Law favours not. *Aliter* in case of Distress for Rent or Damage-Fesant. *Co. 2 Inst. 107. vide Stat. 21 Jac. c. 13.*

If a Man take my Sheep Damage-Fesant, and I tender him sufficient Amends before the Impounding, and he refuse this and drive the Beasts

to the Pound, he is a Trespasser *ab initio*. Tender after the Distress and before the Impounding makes the Detainer tortious. 2 *Rolls Abr.* 561. 8 *Rep.* 147. Six Carpenters Case.

Tender of Amends is a good Plea in Bar for the negligent Escape of Beasts into the Land of another, but not for a voluntary Trespass. 2 *Rolls Abr.* 570. *Walgrave's Case*.

Trespass was 4 *March*. Defendant pleads the Trespass was involuntary, & *quod post transgressionem factam, scil. 24 March* he tendred amends for the Trespass, and doth not say, before the Original brought, as by *Stat. 21 Jac. c. 26*. It's ill Plea. *Litt. Rep.* 152. *Turnold's Case*.

The Defendant may plead the Trespass was involuntary, and disclaim in the Title without pleading the Statute of 21 *Jac.* which is a general Statute. *Litt. Rep.* 355. *Jennings and Cosins*.

Bar quod Def. obtulit quer. emendas pro Transgress, quas quer. recusavit. *Wilk.* 287. 1 *Br.* 167. 2 *Browne* 278.

Quod Def. obtulit quer. modium tritici pro transgress. involuntaria fact. in terris de novo assignat. cum averijs. Repl. protestando quod emende non fuer. sufficien. pro placito non obtulit. 3 *Br.* 482. *Tompl.* 360, 361.

Issue de 1 s. oblat. pro emendis ante Original prosecut. 3 *Br.* 482.

Tender of Amends pleaded in Involuntary Trespass, & *modus placitandi.* 1 *Browne* 360.

Tender des Amends post Trespass fact. pleaded, & modus placitandi. 1 *Browne* 360, 361. *Tompl.* 304. *Repl. quod non obtulit. Rej. quod obtulit, & Issue. Repl. quod Def. obtulit quer. 8 s. in emendis pro Transgr. fact. in alio loco, & traverse quod obtulit pro Transgress. in loco de novo Assignat.* *Hern.* 620, 720.

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Trespafs in B. R. Bar per tender des Amends. Repl. que devant tender le Def. fuit arrested per Latitat. Hern. 732.

Quod Def. dedit al A. 12 d. solvend. Quer. in satisfactiōe Transgr. quas querens recepit. Repl. quod non recepit 12 d. in satisfactiōe Transgr. Ash. 452. 2 Browne 258.

Def. pleads tender des Amends, & disclamat habere aliquem titulum sive clam. in tenementis, &c. Repl. quod tender fuit fait alio loco quam in terris de novo assignat. & traverse, &c. Winch. Entr. 1109.

Tender des Amends, demur inde. Co. Entr. 602.

The Defendant pleads Tender of 2s. 6 d. and averred this was sufficient *per Stat. 21 Jac.* and Issue upon the Sufficiency of the Amends. The Defendant began the Evidence to prove it sufficient, as to shew the Trespafs and prove the Tender, &c. The Plaintiff was not permitted to shew or prove more Trespafses than for that he hath declared; and that that the Plaintiff sets forth shall be the Trespafs, if they vary. At a Trial before Judge *Vernon*.

The Defendant pleads *secundum Stat. 21 Jac.* That he tender'd Amends before the Action brought, *viz. 2 Oct. 7 Car.* The Plaintiff replies, That before such Tender he sued a *Latitat Teste* the last Day of *Trinity-Term* before, and upon that procured the Defendant to be arrested, intending to declare in Trespafs. *Per Cur.* this Tender came too late. For as well as a Tender after an Original Writ comes too late: So after an Arrest upon a *Latitat*, the Tender by the Statute is intended to be immediately after the Trespafs and before the Suit commenced. *Cro. Car. 264. Watts and Baker.*

Plead

Plead 10 s. tender'd. The Trespass was laid to be in *May, July, October*. The Plaintiff must prove the several Trespasses and several Days *pro-ut* in the Declaration. It had been better to have laid the Trespass such a Day with a *Continuando*.

Bar by Licence.

A Licence to enter and occupy Land from such a Day to such a time, is a Lease, and should be so pleaded, and not by way of Licence. *Plowd. Com. 542. 4 H. 7. 1. in Paramour's Case. Sid. p. 428. Mod. Rep. 14. 2 Keb. 561. Hall and Seabright*

If the Defendant in Trespass pleads a Licence, he ought to traverse all Trespasses before and after; if he pleads a Release, he must traverse all Trespasses made after; if a Feoffment, all Trespasses made before. *Hub. p. 104. Digby's Case.*

One justifies to the same day by a Licence, yet he ought to take a Traverse. *Siderf. p. 234. Elyot's Case.*

If any misuse a Licence given by the Law, he shall be a Trespasser *ab initio*. *Aliter* of a Licence of the Party. *8 Rep. 146. Six Carpenters Case.*

The Defendant justifies by Licence such a Day, which was after the Trespass, it's ill. As Trespass *quare Clausum fregit*, The Defendant pleads, *ante tempus quo*, &c. the Trespass is supposed, *viz.* such a Day, which was the Day after the Trespass, the Plaintiff licensed, &c. The Plea is ill in Substance on General Demurrer. *Sid. p. 428. Hall and Seabright.*

One may justify the entering into an House to demand Money owing to him, if the Matter be there; but not by Licence of a Servant. *Cro. Eliz. 876. Holdringshaw and Ragg.*

Trespass

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Trespafs for breaking his House and taking away a Corflet, &c. of the Plaintiff's. The Defendant pleads, Long time before *J. P.* was seized of the said Corflet, &c. as of his own Goods remaining in the Plaintiff's House, and that he sold them to the Defendant, and he *tempore quo*, &c. came to the Plaintiff's House and demanded them, and the Plaintiff's Wife licensed him to enter and take them. *Per Cur.* the Plaintiff shall recover as to the entring into the House, but not as to the Goods; and the Wife's Licence to enter is not good. *Cro. Eliz.* 245. *Taylor and Fisher.*

Trespafs for eating his Hay with his Cattle. The Defendant justifies, for that Sir *W. P.* was seized, &c. and lett the Land to him, and he put in his Beasts, &c. The Plaintiff replies, before that Lease made, Sir *W. P.* licensed him to put in his Hay upon the Land, till he might conveniently sell it. The Defendant demurrs, Judgment was against the Plaintiff. (He had two Years time to remove it.) and *Dodderidge* gave an excellent Reason. The Owner of the Hay ought to preserve it at his Peril; for by this Licence the Owner of the Land doth not exclude himself from taking the Profits of the Land. It was also agreed in this Case, where a Man claims by Licence which is not of Pleasure but Profit, it's not revocable; and where the Authority is limited to one certain time, it's not revocable before the time expired, and therefore the making of the Lease is no Revocation; and there ought to have been Notice given the Plaintiff of the Lease. *2 Rolls Rep.* 143. *Popham's Rep.* 151. *Webb and Paternoster.*

Justification for that the Plaintiff's Bailiff gave him Licence to go that way with his Cattle, and good. For though a Bailiff cannot give Licence to do a Trespafs, as to cut down Trees, nor to accept Amends for a Trespafs, as *5 Rep.* 76. yet he

he may license one to go over his Master's Land for Recompence. *Crok. Jac. 377. Wingfield and Bell.*

If the Defendant in Trespas plead Not Guilty, and gives Licence in Evidence, this Evidence doth not warrant the Issue. *25 H. 8. Bro. 81. cited in Plowd. 14. a.*

The Defendant justified by Licence for himself and his Wife to inhabit. The Plaintiff replies, *non licentia vit* the Husband and Wife *modo & forma.* and it's found *non dedit licentiam modo & forma.* If it had been found the Plaintiff did license to Baron and Feme, it had been good; but not in the negative: For the Defendant's Plea may be true. *3 Keb. 755, 761. Jepson and Jackson. Quare.* It seems to be a Distinction without a Difference. But this Case is more solidly reported, *1 Levinz. 194.*

Trespas for entring into his House, and continuing Possession for three Years, against Baron and Feme. The Defendant pleads *Non culp. quoad* two Years, and *quoad* the third a Licence for the Husband to enter with his Wife and Servants, and there to inhabit. Issue *Non dedit Licentiam* to the Husband and Wife *modo & forma prout*; both Issues found *pro Quer.* and intire Damages in *B. C.* Error is brought and assigned, That the second Issue is impertinent and void; for when the Defendant pleads Licence to him to enter with his Wife, &c. the Replication *quod non dedit Licentiam* to the Husband and Wife is foreign, and does not meet with the Plea: For he might give Licence to the Husband to enter with his Wife, in which case the Licence is given to the Husband only; and yet he gives not Licence to the Husband and Wife; and it is a material Difference, for it amounts to a Lease, and the Judgment was reversed. *2 Levinz. 194. Jepson and Jackson.*

If

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If to a Trespas *de clauso fracto* 11 March, the Defendant pleads a Licence 5 Maij, there he may and must traverse *absque hoc quod sit culpab' ante Licentiam sibi concessam*; and the Plaintiff may take Issue upon the Licence or upon the Traverse. *Kel. 340. Hob. 104.*

Bar by the Statute of Limitations.

All Actions of Trespas of Assault, Battery, Wounding and Imprisonment, shall be commenced within four Years after the cause of Suit, and not after.

One never pleads to the *vi & armis*, where he begins with the Statute of Limitations.

The Plea is good, though he doth not shew the Continuances of his Proceedings, especially upon Appearance. *Stiles Rep. 379. Whitehead and Buckland. and p. 401, 402, 403.*

To Assault, Battery and Imprisonment the Defendant pleaded the Statute of Limitations. The Plaintiff replies and sets forth a Writ against the Defendant; but it doth not appear there are Continuances down till the bringing this Action; yet good. 2 *Keb. 188, 230. Brown and Tripp.*

W. brought Trespas by Original Writ. The Defendant pleads the Statute. The Plaintiff Replies, He took out an Original Writ within the time limited by the Statute. *Et de hoc, &c.* for they have tied up the Defendant that he cannot rejoin. The Defendant demurs, because he shews not what Writ he sued forth. *Per Cur.* he need not; if the Writ be not good he may have a Writ of Error. But the Conclusion is not good, for they have tied up the Defendant that he cannot rejoin. *Stiles Rep. 379, 401. Whitehead's Case.* But *per Rolls*, the setting forth the Original by the Defendant, and to conclude he is not guilty within six Years from

from that time is not good: he ought to plead Not Guilty within fix Years before the Original sued forth. *Ibid.*

Trespafs of Assault and Battery. The Defendant pleads the Statute of Limitations. The Plaintiff replies within four Years he took out a *Latitat* and continued it down *pro causa prædicta. Et hoc petit quod inquiratur, &c.* The Defendant traversing the Issuing of the *Latitat.*, *pro causa prædicta infra* the four Years; it was moved in arrest of Judgment, that this should be tried by the Record. *Sed non allocatur*, Issue being as well on the Time as the Issuing of the *Latitat*: But on the Issuing of the *Latitat* alone, it must be said, *prout patet per Resordum. 2 Keb. 680. Cragnell versus Robinson.*

The Defendant pleaded the Statute of Limitations. The Plaintiff replies, In the Usurpers Time the King's Courts were shut up, so that he could not prosecute by Writ. Judgment *pro Def. 1 Keb. 157. Weller and Prideaux, 104.*

Replic' al Stat' de Limitations (viz.) Lai' prosecuted and continued usq; exhibitionem Billæ. Tomps. 334.

Per Release.

If the Defendant in Trespafs pleads a Release, he must traverse all Trespafses done after: If a Feoffment, all done before, If a Licence, all done before and after. *Hob. p. 104. Digby's Case.*

In Trespafs for riding an Horse. The Defendant pleads, That the Plaintiff *postea, scilicet* such a day *huy exoneravit del Trespafs.* This is no Plea to a Trespafs in no Case, without pleading a special Accord: But in Action *sur Case sur Assumpsit* it may, if it be before breach of Pro-
If

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mise. *Siderfin* p. 293. *Tr.* 18 *Car.* 2. *Westlake's Case.* 2 *Keb.* 69. *mesme case.*

If two commit a Trespafs, and a Release is made to one, provided that the other shall not take Benefit of this Release, it's a void Proviso. *Litt. Rep.* 191.

In Trespafs, the Defendant as a Copy-holder, claims to have in the Land of his Lord Common by Prescription. The Plaintiff pleads a Release of this made unto him by the Defendant. The Plaintiff pleads to this, *Ne releffa pas*. It's not a good Plea: for where one is Party to the Deed, there he ought to answer directly, *non est factum*. *Aliter* if he were a Stranger to the Deed, there he may well plead *ne releffa pas*, or *riens passa per le fait*; and so by this means the Validity of the Deed will come in question, and the Books agree in this difference. 2 *Bulst.* 55. *Richardson* versus *Pistell*.

The Defendant in Trespafs pleads a Release of all Actions in *B.* and upon *Oyer* it was entred *in hac Verba*; and it appears that some things were excepted out of the Release. The Plaintiff had Judgment on Demurrer: For it shall not be intended the same Release. *Palmer* 411. *Margoram* and *Avis*.

Al Count port per Executors pour biens prises hors de leur Possession. Def. pleads al part non culp. & al auter part le Release d'un Executor. Repl. que Release fuit d'auter biens, & non culp. pleaded al eux. *Winch. Entr.* 1119.

Quod Quer. in consideratione relaxationis sibi per Def. relaxavit dicto Def. omnes actiones & transgressiones per dict' Def. quer' illat. 2 *Browne* 145, 149.

Release al Trespafs pleaded. *Tomp.* 335.

To Assault, &c. the Defendant pleads, Such a Day and Place the Plaintiff *exoneravit, relaxavit* &

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& quiete clamavit to the Defendant, all Actions. It should have been, He released *per Scriptum*. *Siderfin* 175. *Bleek and Grove*.

Pur Necessity. Vide supra.

Pur bien Publique. Vide supra.

It is not lawful to do a Tort though it sound to the Profit of another. If a Man see the Beasts of his Neighbour in another Man's Close Damage-Fesant, it's not lawful for him to chase them out; and if he do, the Owner shall have Trespafs. *Dier fo. 36. Pl. 38.*

Parson brought Trespafs for taking away Corn. The Defendant pleads, That the Corn was severed from, *&c.* and was in jeopardy of being destroyed, *&c.* for which the Defendant carries them to the Plaintiff's Barn. *Dier fo. 36. Pl. 39. no Plea.*

Quod Def. cepit pred. peciam subbosci vocat. a Pole, extra Manus Quer. & deliberavit Constabulario pro meliori custodia pacis. Repl. de son tort. I Browne 378.

By Default or Act of the Plaintiff himself.

Default of Inclosures, *vide* Bars des Inclosures.

The Defendant pleads, That in the Close where the Plaintiff supposeth the Trespafs, there is, and time out of Mind was, a Foot-way for all People in, *per & trans* the said Close unto such a Place; and that the Plaintiff such a day plowed up the said Foot-way and sowed it, and near the ancient Foot-way he *reliquit & assignavit* another Foot-way, *&c.* and the Defendant went this new Way. A good Bar and Excuse; for the Plaintiff did the first Wrong, and assigned a new Way, and contrary to

to his own Agreement he shall not punish the Defendant. He saith the Plaintiff *assignavit viam*, and saith not to whom, yet it's good. *Quod est commune omnibus* may not be assigned to any particular Person. *Yelv. p. 141. Horn and Wildlake.*

I may justify the Entry into another Man's Land, to throw down a Nuisance; as Water runs by the Land of M. and M. stops the Water-Course, so that it surrounds my Land; he shall not have an Action against me if I enter into his Close to abate this. *2 Rolls Abr. 565. 9.*

If a Man wrongfully imprison me in his House, I may justify the breaking the Windows and House to get out. *2 Rolls Abr. 566.*

If I have an heap of Corn or Money, and another comes and casts his Corn or Money into my Heap, I may justify the carrying away the whole. *Cro. Jac. 366. Ward and Ayre.*

The Plaintiff and Defendant being at play, the Plaintiff thrust his Money into the Defendant's Heap and mixed it, and the Defendant kept it all. The Plaintiff brought Trespas *quod cumulum pecunie* containing five Marks, *cepit, &c. Per Cur.* the Action lies not. *2 Bulstr. 323.*

The Plaintiff pretending Title to certain Hay which the Defendant had standing in certain Land, to be more sure to have the Action pass for him, took other Hay of his own and mixed it with the Defendant's Hay; after which the Defendant carried away both the one and the other. *Per Cur.* the Defendant shall not be guilty for any part of the Hay. If a Man take my Garment and embroyder it with Silk, or Gold, &c. I may take back my Garment: But if I take the Silk from you, and with this face my Garment, you shall not take my Garment for your Silk which is on it; but are put to an Action for taking the Silk from you. So here, if the Plaintiff had taken the Defendant's

Defendant's Hay, and carried it to his House, and there intermixed it with the Plaintiff's Hay, there the Defendant cannot take back his Hay, but must sue the Plaintiff for taking his Hay. This difference was agreed *per totam Cur.* If a Goldsmith be melting of Gold in a Pot, and I will cast my Gold into the Pot, and it's melted with the other, I have no remedy for my Gold, but have lost it. *Pop. Rep. pl. 38.*

One Tenant in Common may not justify the entering into the several Land of another, to take a thing which is in common. *2 Rolls Abr. 566. Masters and Polley.*

A Man leaves an Iron Bar in my Close; in Trespafs for the taking this away, I may justify the taking and putting it into the Close of the Plaintiff. *2 Rolls. Abr. 566. Cole and Maunder.*

If one loads my Cart with his Corn, or puts his Coals into my Boat, I may detain them without being any Trespasser, until he bring his Action of Detinue or Replevin: So if one puts a Saddle on my Horse. *1 Bulstr. p. 96.*

Trespafs for Chasing. The Defendant justifies Damage-Fasant in his Free-hold. The Plaintiff replies, and shews a Grant of the Common in the Place where, &c. by the Defendant; and how the Defendant erected a Stack of Corn, and the Plaintiff put in his Beasts to use the Common, and the Defendant chased them, &c. *Per Cur.* the chasing is not lawful; and by such means the Defendant should defeat his own Grant. *Yelv. p. 201. Farmer's Case. Cro. Jac. p. 271. mesme Case.*

A. lett Land to B. for Life, and after letts this to C. for Years to commence after the Death of the Lessee, and after B. sows part of the Land and dies before severance of the Corn, and after C. enters into the residue of the Land not sown, and puts in his Cattle, and the Beasts against his will

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eat the Corn. The Executor shall have Action of Trespas against him, and this shall not excuse; for the Executor hath the Right to the Corn, and they must grow till a convenient time to be removed. 2 *Rolls Abr.* 568. *Pitts and Collybeare.*

Excuse by Fraud.

One knowing Execution will be upon his Goods, procures J. S. by Covin to lay one of his Carts in his Yard, on purpose that the Bailiff might take it in Execution, so that he might have Action of Trespas against him; and the Bailiff took it, and after he had knowledge thereof sent it back; and yet J. S. brought Trespas. *Per Ley* Chief Justice, the Bailiff may plead the Fraud in excuse. 2 *Rolls Rep.* 393. *Groome and Groome.*

Bar by Pardon.

By shewing a Pardon by Act of Parliament is a good Plea. *Old Book of Entries* 596.

A *Continuando* from 20 June until 6 Nov. following; and upon Not Guilty, it was found *pro Quer.* and no entry of the Fine *quia pardona-tur*; though the Act of Parliament pardoned but to 25 Sept. and so but part pardoned, yet no *Capiat* was entred for the first Trespas, *vi & ar-mis* being pardoned, the *Continuando* (being as to the Consumption of the Grass) is for the Increase of Damages only. *Cro. Jac.* 207. *Strickland and Thorp.*

In what Cases a Man may justify as incident to another thing.

If a Man bargain and sell all his Trees growing on his Land, the Grantee may come upon the Land

Land to cut them down and carry them away:
2 *Rolls Abr.* 567. M.

If a Man grant to me to make a Trench in his Soil from such a River unto my place to lay in a Pipe, &c. if my Pipe be stopped I may dig his Land for to amend the Pipe. So if I have such a Pipe by Prescription. 2 *Rolls Abr.* 567. *vide supra.*

Bar by an Action depending in another Court for the same Trespafs.

It is a good Plea, *Bro. Trespafs* 357. as that the Plaintiff hath Replevin depending in another Court for the same Trespafs, is a good Plea.

So to plead, after the Plaintiff hath declared, there is another Action depending in the Courts of *Westminster* for the same Matter: But that there is an Action in an inferior Court is not a good Plea unless Judgment be given. 5 *Rep.* 61.

By Recovery en auter Action.

Recovery in an Action of Trespafs at Common Law, is a good Bar in an Action of Trespafs on the Statute. *Vide prius cap.* 40.

If Baylee of Goods bring Trespafs, and the Baylor brings another Action of Trespafs, he which first recovers shall oust the other of his Action, it shall be a good Bar to the other. 2 *Rolls Abr.* 569. 5 *H.* 4. 2.

Where Damages for Goods are recovered against J. S. J. S. shall have after Trespafs for the Goods. 1 *Keb.* 43.

Affault and Battery against W. for Battery committed by him *simul cum* J. and Judgment against him and Damages levied; and after another Action is brought against J. and he is found Guilty, and

S 2

good:

good: but if he will take dvantage of the first Recovery, he ought to shew it in pleading: *Litt. Rep. fo. 37. Watson's Case. Hob. 66.*

Bar by recovery by the same Plaintiff in *B. R.* for the same Battery, against another who joins in the Battery. *Repl. nul tiel Record. Litt. 56. Garton.*

Trespafs by the Plaintiff for assaulting the Wife
 12 Apr. ---75. The Defendant pleads former Recovery in Trespafs 27 Apr. ---75. by the Plaintiff and his Wife, *quæ est ead. &c. absque hoc* that he is guilty of the said Trespafs on 12 Apr. or at any time before or after the said 27 Apr. seems not good: But had the Trespafs been laid 29 Apr. or at any time after 27 Apr. had been sufficient; because the Plaintiff cannot give evidence precedent to the Day of the Recovery, but subsequent until the Day of the Declaration entred or Bail filed he may. 3 Keb. 568. Kidder and Wall.

Note, Diversity, where the Demand and Recovery is of a thing certain, and where of a thing uncertain; as in Trover for certain Goods in particular. The Defendant pleads that the Plaintiff had brought such Action against *J. S.* for the same Goods before this Action brought, in which Suit he so far prosecuted *J. S.* that he had Judgment and Execution against him; and avers, That the Goods comprehended in both Actions are the same Goods; a good Plea. Execution is not any Satisfaction: But where Trespafs is made by two, which rests only in Damages, and the Plaintiff recover against one and had Execution, this is a good Bar against the other: Nay, the very Judgment is a sufficient Bar; for *transit in rem Judicat.* and the thing uncertain is now altered into another Nature and made certain. So of Battery by diverse, the first Recovery against one is a good Bar. *Yelv.*

p. 67. *Broom and Wootton.* 1 Leon. 19. *Lendall's Case: Cro. Jac.* 73. *Browne's Case.* 3 Leon. 122.

But if Moneys are paid in Satisfaction of a Trespafs, it's a good Bar. 2 *Rolls Abr.* 569.

If one recover in Appeal of *Mayhem*, this shall not be a Bar in Trespafs for the Battery. 2 *Rolls Abr.* 570.

S. brought Trespafs against C. for breaking his Close, and declares of a Trespafs in *Sommers Land* in *Tunbridge*. The Defendant pleaded, That heretofore he himself brought Assize of *Novel Disseisin* against the now Plaintiff, and supposed himself to be disseised of his Free-hold in *Lee juxta Tunbridge*, and the Land *in quo*, &c. was put in view, &c. and avers, That the Land where, &c. and the Land put in view is one and the same. No Plea. But if the now Plaintiff, who was then Tenant, had pleaded to the Land put in view in Bar, and the Plaintiff in the Assize had recovered, now the Plaintiff in the Assize being Defendant in this Action, might well plead this Recovery in Bar: But in this case where the Tenant pleads *null tort null disseisin*, he doth not expressly plead to the Land put in view, but to the Supposal of the Plaintiff (*viz.*) *de libero tenemento in Lee juxta Tunbridge.* 1 Leon. 24. *Stacy and Carter.*

Trans. de Pisce capt. Bar per Recovery in primer Action. Repl. Def. cepit plures oves quam qui fuer specific. in priori Actione. Ra. Entr. 655.

Replevin de 2 Spadones taken 28 July. 33 Car. 2. in two Acres of Land, and named them. The Defendant pleads, That *Trin.* 34. the Plaintiff brought other Action of Trespafs *quare clausum fregit & 2 equos* of the Plaintiff *cepit & abduxit*, and also spoiled his Grass, and received 40 s. Damage and 14 l. Costs; and avers the *Spadones* in the Declaration, and the *Equos* in the former Action,

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Action, and the taking are the same. The Plaintiff demurs generally. *Per Cur.* the Averment that the *Spadones* in the Declaration, and the *Equos* in the former Action may well be the same, for *Equus* is a general Word for all sorts of Horses. 2. It was argued, That the Recovery in Trespafs shall not be a Barr in this Action, which is for the same Cattle, the other only for Damages, which may be given for the taking only, and for the other Trespaffes, and not for the Value of the Cattle themselves; and 40 s. is not supposed to be the value of two Horses, and no Averment is here for what the Damages in the first Action were given; nor does it appear for what the 40 s. Damages were given, but only by supposal. 3. *Levinz.* 124. *Field* and *Tellicus*.

Plea by Judgment in Inferior Court

Trespafs for taking the Plaintiff's Beasts. The Defendant justifies, and pleads a Plaint levied in Debt in *Worcester-Court*, and counts upon it that the Defendant being indebted to the Plaintiff *infra Jurisdiction. promiss. &c.* upon which *talit. processum fuit*, that after, to wit, 2 Oct. 34 Car. 2. *considerat. fuit*, &c. and by Warrant upon this Judgment he justified. The Plaintiff replies, *de injuria sua propria absque tali causa, absque hoc quod habetur aliquod tale Recordum*, &c. The Plea is ill: 1. He Pleads the Court held time out of memory, &c. before 2 Jac. 1. *coram Ballivis*, and then *coram Majore*, &c. and shews not any Grant for the Alteration of it; and then the Court held before the Mayor was without any Authority, and the Judgment void. 2. It is not shewed in the Plea that the Cause of Action arose within the Jurisdiction, and then the Judgment is *coram non Judice*, and void. It is true, in the Declaration set forth

forth in the Plea it is said to be *infra jurisd. Cur.* but this is not sufficient, for it is traversable, and the Matter in the Declaration there is not traversable here, but only that which is alledged in the Plea here. The Replication is ill for the double Traverse; yet the Declaration being good and the Plea ill, Judgment *pro Quer.* 3 *Levinz.* 243. *Adney and Vernon.*

Trespas for that the Defendant *simul cum, &c.* 17 *Apr.* 4 *Regis nunc, &c.* assaulted, beat, wounded and imprisoned him twelve Months. The Defendant *quoad vi & armis & vulnerat.* pleads *Non Culp. & quoad resid. Transgress. insult. imprisonment & detention.* in *Prisone* he said, *St. Edmund's Bury* is an ancient Borough, and that the Defendant *infra Jurisd. Cur. de Recordo* of the said Borough was indebted to the Defendant, and for the Recovery of it the Defendant *implacitasset illum in ead. Curia, & invenit pleg. ad prosequend. sectam suam & superinde taliter processum fuit in eadem Cur.* that he had Judgment and Execution, which he delivered to the other Defendants in the *simul cum,* who *apud D. infra, &c. molliter manus imposuit super eum,* and arrested him, *&c. Per Cur.* this short way of pleading the Judgment in an inferior Court is good, though otherwise it has been formerly used. It was objected that the Plea was ill, because in the *quoad resid.* he had omitted the Battery, which makes a Discontinuance of the whole. But then it was answered, *quoad resid. Transgress. præd.* is a sufficient Answer to all. 2. 3 *Levinz.* 404. *Patrick and Johnson.*

C A P. XX.

Of Traverses in Trespas; wherein I shall first lay down some General Rules, and then speak of traversing the Place, Time, Discent, Seisin or Disseisin, or Conveyance, or dying seized, and where one must make a Title on his Traverse, and where it is not necessary; and where a Man. must traverse, and where it is not necessary. In all which I have cited the Cases somewhat largely, because this sort of Learning is Curious and Intricate.

TO traverse is no more than to deny a thing to be true, in these Words, *Absque hoc, &c.* Kitch. 140, 227.

Take two or three Rules of Traverses in general before I come to the particular Points.

Rules of Traverse.

1. If one will take a Traverse to a Declaration, he ought to traverse that part of it (or the material part) that the doing thereof will make an end of the Matter for which the Plaintiff declares, and then the Traverse is good. *Stiles pract. Reg. 318.* as where there is a Disseisin and a Discent alledged in a Declaration, if the traversing the Disseisin will make an end of the Matter, there the Disseisin is to be traversed, and not the Discent; as in such Cases where it may be supposed that the Party may come to the Estate by Disseisin. *ibid. Stiles. Rep. 344. Wood and Holland.*

Trespas

Trespafs for taking his Beasts in *B.* The Defendant justifies that this is the Free-hold of *M.* and that he as his Bailiff took the Beasts Damage-Fesant. The Plaintiff replies, *De injuria sua propria, absque hoc* that he is Bailiff. It's an ill Traverse: this makes no end of the Matter, because he hath confessed it was the Free-hold of *M.* and if the Free-hold be in a Stranger, the Plaintiff had not Colour to have Trespafs, be the Defendant Bailiff or not. 1 *Rolls Rep.* 46. in *Lee's Case.* 33 *H. 6.* 3.

Trespafs for taking three Loads of Oats. The Defendant pleads he took them Damage-Fesant being on his Land, of which Land he had a Lease made to him by *B.* the Place called, &c. within such a Parish. The Plaintiff replies and agrees the said Lease, and saith, he was Parson of the Parish of *T.* and he took the Oats for Tithes. The Defendant rejoins, *protestando* That they were not set forth for Tithes, *pro placito* that *S.* did not demise to *H.* for one Year, who (as the Plaintiff supposeth) did sow the Land, and did set forth the Oats for Tithes, and traverseth the Lease made by *S.* to *H.* for a Year. The Traverse is bad, both as to the Matter and the Manner, this is an immaterial Traverse, and goes not to the point of the Action, be the Demise to *H.* for one Year or half a Year, it's not material. The Defendant might have said he was not Parson, or that it was not within the Parish, or *absque hoc quod possessionat. fuit* and sowed; and a material Traverse might have been upon any of these. And as to the Manner of the Traverse it is also void; for he doth here only Traverse the Conveyance to the Title which enables him to have the Tithes, which is not good. 3 *Bulstr. p.* 336. *Mountford and Sidly.*

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If the Traverse answers the material Part of the Declaration is well enough. *vide 2 Sanders 3. Mellor and Walker.*

2. Where the Defendant hath given a particular answer in his Plea to all the material Matters contained in the Declaration, there he needs not to take a Traverse; for a Traverse is the denial of a thing, and when a thing is answered there needs no denial. So it is where the Defendant hath confessed and avoided all the Matter contained in the Declaration. *Stiles pract. Reg. 319.*

Trespafs for breaking his Close. The Defendant saith, That it is his Free-hold; if the Plaintiff doth entitle himself by a Term for Years, he shall not traverse the Free-hold of the Defendant; for that he had sufficiently avoided it. *Cro. Car. 384. 1 Sanders 23. Vide infra.*

3. In a Plea you must never conclude a Traverse, *Et de hoc ponit se super Patriam*. If it be so pleaded demur specially.

4. Where a thing alledged doth confess and avoid my Plea, I may traverse it. *13 Eliz. Dier. Touch. Pres. 199.*

5. Where the matter is not traversable without an Inducement, the Inducement it self is traversable. As in Trespafs, Justification by special Warranty, *absque hoc* that he is guilty before or after the day of the Warrant, is traversable. *3 Keb. 207. in Dunsdale's Case.*

6. If one bring an Action of Trespafs for breaking his Close on a certain Day, if the Defendant plead a Release of all Actions, he shall traverse all Trespasses after; if a Feofment, he shall traverse all Trespasses before; if a Licence for once, all before and after. Now the Plaintiff hath choice to leave the Traverse, and to traverse the point of Justification (*viz.*) the Release, Feofment or Licence; or he may alledge a Trespafs before

before or after, and so join upon the Traverse offered: this is a Traverse after a Traverse, but not a Traverse upon a Traverse to the self same Point. *Hob. p. 104. in Digby's Case.*

7. The Traverse must not be of Matter in Law. The Defendant justifies as Bailiff by *Fi. Fac.* who *per vias usuales* entred the Plaintiff's Barn where the Goods were, &c. The Plaintiff replies, the Doors were shut, *absque hoc* there was a Request. It's a void Traverse, and also double. And *per Cur.* it's not material in case of a Barn (which doth not appear to be Parcel of a Dwelling-house) whether the Doors be open or shut, and so the Traverse immaterial. 1 *Keb. 698. Penton and Browne.*

8. The Traverse must be a full, exprefs, and strict Answer to the Point, and not by way of Circumstance. Trespas for taking his Cattle, *ita quod per fugationem interierunt.* The Defendant pleads the Place where is holden of him by such Services, and that he distrained and impounded them in a Pound overt, and that they died there *de Fame* in default of the Plaintiff, *qua est ead. Tran.* It's no good Plea, without a Traverse *quod per effugationem non interierunt.* *Cro. Eliz. p. 384.* Pleads Entry and Intrusion. Repl. saith, *absque hoc quod H. O. intravit & sic se intrusit.* It's ill. *Yelv. p. 170. Goddard's Case.*

9. To a common Bar the New Assignment is sufficient in a Replication, and a Traverse is idle. As Trespas for taking forty Cart-loads of Hay in K. The Defendant pleads the Hay grew in D. and that the Tithes thereof belong to the Vicar, and he as Servant, &c. The Plaintiff replies, these were growing on other Lands in K. *absque hoc* that they grew in D. the Lands alledged by the Defendant. The Defendant rejoins, that they grew in D. *absque hoc* that they grew on the Plaintiff's

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Plaintiff's Land. The Traverse is void. 3 Keb.
728. Darrell's Case.

Traverses are sometimes of the {
 Place,
 Time,
 Matter, as { Discent,
 Seisin or Disseisin.
 Manner.

Traverse of the Place.

As to traversing the Place alledged, observe:

Where the Justification is Local (that is) where it is restrained to a certain Place, there the Traverse of the Place is good.

To understand this, you { { Local,
 must know Justifications are { Transitory.

Local is, when the Cause of the Justification is tied and restrained to a certain Place, it is so local that it cannot be alledged in any other Town or Place; as Sale of Goods, Conusance of Pleas, killing a Dog on a Warren, cutting and taking away of Trees, Faux Imprisonment, digging Ground, &c.

Transient or *Transitory* is, When the Cause for which the Defendant justifies is not restrained to a certain Place, but may be alledged any where; as *son Assault demesne*, or that the Plaintiff assaulted him. In Action of Assault and Battery, the Defendant shall not traverse the County: For the Reason of this Difference is (*viz.*) carrying away Goods, spoiling Writings, &c. are *Transient*.

In Trespafs for a Tort, the Plaintiff may alledge it to be done in any other Place, or in another County; and if the Defendant pleads not Guilty, the

the Jurors are bound to find for the Plaintiff. And so in Actions brought for things Transitory. Neither can the Assault, Battery, or taking of the Goods alledged in another County be traversed without special Cause of Justification, which extendeth to some certain Place: As if a Constable of a Town in another County arresteth the Body of a Man that breaks the Peace there, he may traverse the County (but he must not rest there) but all other Places saving in the Town whereof he is Constable. And so it is of taking Goods, the Defendant justifies for Damage-Fesant in another County, he must traverse as before.

But where the Cause of the Action is not restrained to a certain Place, and so local as it cannot be alledged in any other Town, as in the Cases abovesaid, and the like; then albeit the Action be brought in a Foreign County, yet he must alledge his Justification in the County where the Action is brought. As if a Man be beaten in the County of *Middlesex*, and he brings his Action in the County of *Bucks*, the Defendant cannot plead that the Plaintiff assaulted him in the County of *Middlesex*, and traverse the County of *Bucks*, but he must plead his Justification in the County of *Bucks*, for that the Cause of his Justification is good in any Place. *Co. Litt.* 282.

More Cases applied to this Rule.

Trespass for taking of Goods in a Place in *Yorkshire*. The Defendant justified in a Place in *Durham*, *absque hoc* that he was guilty in *Yorkshire*. It's a good Traverse to the Place, for it is local. *Winch.* p. 7.

Partridge was beaten in the County of *Gloucester* by Sir H. P. for which he brought an Action in *London*. Sir H. P. would have justified by Assault

fault of the Plaintiff in the County of Gloucester, with a Traverse that he was not guilty in London. But it was then ruled by the Court, that he could not oust the Plaintiff to sue in London: But in such a Case he might have alledged, that the Assault was done in London, because it was also a thing Transitory, of which they shall take notice there, and so help himself if the Matter had been true. This Case cited in *Popham's Rep.* 101. in *Paramore* and *Verrald's Case*. Now it is the common Practice in such Case to alter the *Venue* on Affidavit. But,

Assault and Battery in London. The Defendant Pleaded the Plaintiff entred his House at *W.* in *Essex*, and he *molliter manus imposuit* upon him to put him out of his House, *quæ est ead. Assault, Battery & Maletractatio, absque hoc*, that he is guilty *extra W.* and it was thereupon demurred, because this Trespafs being transitory the Place is not traversable. But *per Cur.* the Cause of Justification being local (*viz.*) the maintaining the Possession of his House, he cannot justify in another Place, and he may traverse every other Place. But as to *Partridge's Case*, where one justifies by reason of an Assault in another County, and traverseth the County in the Declaration, that is not good, because the Justification is personal and transitory as well as the Battery. *Cro. Eliz.* 705. *Peacock's Case. Vide Cro. Eliz. Purchase and Hutchins.*

But *Partridge's Case* was, The Plaintiff supposed the Battery at *B.* in *Com. Midd.* The Defendant justifies by reason of an Assault at *C.* in *Com. Gloc. absque hoc* that he beat the Plaintiff at *B.* in *Com. Midd.* The Plaintiff demurs on the Traverse, and Judgment for him, for the County is not traversable, the Matter of the Justification being merely transitory: But if the Sheriff justify Imprison-

Imprisonment by a *Cap.* there the Justification is local, and the Sheriff could not take the Plaintiff by Force of the said Process in another County; and there the Traverse of the County is good.

2 Leon. p. 79. *Partridge and Poole.*

Trespas *quare scy & import en Clanfield.* The Defendant justifies in *B.* and Judgment was *pro Quer.* because he doth not answer to the Trespas; for he ought to have traversed *absque hoc* that he was guilty in *C.* *Aliter* in Battery. 2 Rolls Rep.

495. Bishop of Oxon against Adams.

Trespas for taking of Goods at London 25 Jan. The Defendant pleads that he lett an House in *Covent-Garden* to the Plaintiff, and for Rent arrear 23 Jan. he distrained, *absque hoc* that he is Guilty in *London vel alibi extra St. Paul's Covent-Garden*, or at any time after 23 Jan. *Per Cur.* the Traverse is ill, inasmuch as he may be guilty in another House in *Covent Garden.* *Siderf. p. 293.* *Lady Medeins Case.*

Trespas of Battery and Faux Imprisonment such a Day and Place. The Defendant Justifies at another Day and Place, by Virtue of a Writ and Warrant of the Sheriff upon it, *absque hoc* that he is guilty *aliter vel alio modo, vel* at any other Place. The Plaintiff replies that he is guilty *aliter & alio modo*, and at another Place. Issue and Verdict *pro Quer.* But upon the Illness and Uncertainty of the Issue, Judgment was stayed. 2 Levinz. 164. *Masters and Wood.*

In Trespas for taking of Goods in *Yorkshire*, and the Defendant justified as Servant to the Bishop of *Durham*, who had a Fair, and prescribed to seize Cattle for not paying Toll, and he justified in a Place in *Durham*, *absque hoc* that he was guilty in *Yorkshire.* Good. *Winch. p. 7.*

If the Justification be in another County, the County wherein the Action is brought ought to be

he traverse; and the Plaintiff may maintain the Action, and if he will, or he may traverse the Defence Plea at his Election. Trespass of Assault, Battery and Wounding in London. The Defendant justifies in Com. N. by Virtue of a Warrant upon a *Lettera quæ est ad Transgressio*, *absque hoc* that he is guilty in London, *vel alibi extra Com. Mass.* *Cra. Jac. Sargant and Woodcock.*

When the Justification is local, the County is traversible. *Cra. Eliz. 375. Sparrow's Case.*

Assault and Battery laid at S. in Com. H. The Defendant hath he a Servant to a Scholar of St. John's College in Cambridge, and that they are to have Conscience there, and not be driven out of the University. It's an ill Plea, for he ought to traverse, *absque hoc* that he is Guilty in any Place *extra Univerſitat Cambr.* *Bulſtr. 1. 182, 183.*

Trespass for that *quod R. in Com. C.* he killed his Dog. The Defendant pleads that Sir F. W. was seized in Fee of a Warren by the same County, whereof he is Lord, then was Warrener, and that his Dog was several times killing Coneyes there; and he finding them there *semper quo*, &c. running at Coneyes killed him, *absque hoc* that he was guilty *apud R. Mass.* It's good, though he traverse that Place only, and not all other Places, for the Cause of Justification is local. *Cra. Jac. 44. Wadsworth and Darnley.*

Barr Impriſonment in Middleſex. The Defendant pleads he was Mayor of Lye, and *Custos Carceris* there, *Cra. Jac.* he committed him, *Cra. Jac.* *absque hoc* that he is guilty of the Impriſonment in Middleſex. It was objected that the Traverse is not good; for he cannot traverse the Place but generally, for the Defendant cannot ſtreighten the Plaintiff to a Place. But *per Cur.* the Traverse is good; for if he traverse generally, the Justification

cation in a Place certain shall be waved, which is material as this Case is, and shall not be enforced to it where it is local; and in *Covet's* Case it was adjudged in Faux Imprisonment, He justifies as Constable in *Sussex*, *absque hoc* that he is guilty in *Middlesex*, and awarded good. So in *Lowell's* Case in Trespafs for taking his Horse in *Cambr.* he justifies for Damage-Fesant in *Essex*, *absque hoc* that he was guilty in *Cambr.* and good. *Cro. Eliz.* 168. *Smith* and *Heliar*.

In Trespafs *quod clausum fregit, & arbores succidit in D.* The Defendant justifies the Trespafs in *S.* without that that he is guilty of any Trespafs in *D.* It's made a *Quære* in *Dier* whether it should not be *Non culp.* generally. *Dier* 19. *Pl.* 109.

Trespafs was supposed to be in *London*, and the Defendant justifies in a Close in *S.* *absque hoc* that he was guilty in *L. vel alibi extra S. præd.* 1 *Rolls Rep.* 19. *Quære* if it be a good Plea; for by this Plea he may be guilty in *S.* out of the said Close, which is not answered.

Trespafs for Battery and Imprisonment at *C.* in *Devon.* The Defendant pleads he was Steward of the Court of Stannaries held at *A.* in *Devon.* where, because the Plaintiff would not put in Pledges to a certain Action brought by *J. S. &c.* he gave Judgment and commanded the Officer to take him till he paid 28 *l.* *absque hoc* that he is guilty of the Imprisonment in any Place out of the Jurisdiction of the Stannaries. Upon Demurrer, *per Cur.* the Plea is ill; for that it doth not appear by this Plea, whether *C.* be within the Jurisdiction of the Stannaries or not, and if it be within the Stannaries, then the Plea is not good, because it is no answer to it. 1 *Rolls Rep.* 267. *Evely* and *Sloley.* 2 *Bulstr.* 326. *mesme Case.*

A Man (now) may not traverse the County, unless it be on a special Justification in another

T

Place

The Law of Trespass.

Place, by reason of his Office or such like. *1 Rolls Rep. 1. Vide Cro. Eliz. 860.*

Trespass of Assault and Faux Imprisonment supposed to be done in such a Parish and Ward in *London, 20 May 35 Eliz.* The Defendant justifies by reason of an Execution upon a Recovery in the Court of *Sandwich* within the *Cinque Ports* in Debt, and traverses *absque hoc* that he was guilty in *London, &c.* The Plaintiff replies and maintains the Assault and Imprisonment, and traverseth *absque hoc quod habetur aliquod tale recordum loquele*, prout the Defendant hath alledged, & *hoc paratus est verificare per record.* The Defendant demurs. *Per Cur.* the Defendant's Plea *prima facie* was good, because it was a special manner of Justification, which cannot be pleaded and alledged to be in any other Place than where it was done: But in this Case if the special Matter alledged in the Foreign County be false, as here, the Plaintiff may maintain his Action, and traverse the special matter alledged by the Defendant; and so in such a case a Traverse may be upon a Traverse, when Falsity is used to oust the Plaintiff of that Benefit which the Law gives him. *Popham. p. 101. Paramour and Verrald. Cro. Eliz. p. 18. Mesme Case.*

Trespass for taking two Hats of the Plaintiff at *East-Greensted* in *Sussex* 10 *Jan. 35 Car. 2.* The Defendant justifies for Stallage in a Fair by Prescription, at *Gombridge* in *Kent*, held 14 *Sept. 35 Car. 2. quia* the Plaintiff refused to pay the Stallage, *quæ est ead. &c. absque hoc* that he is guilty of the Caption *extra Feriam præd.* The Plaintiff demurs specially; because *placita præd. non respondit narration?* It was objected that the Traverse is not good, because he does not traverse at another Time, as well as at another Place. But *per Cur.* the Conclusion *quæ est ead.* with a Traverse

verfe of another Place is good, without Traverse at another time. Judgment *pro Def.* 3 *Levinz.* 227. *Bodly and Wilkins.*

A Traverse muft not be a Departure from the firft Plea, nor repugnant to the Matter which induceth it. Trespafs *quare averia cepit apud S. & ad loca incognita fugavit.* The Defendant pleads he took them Damage-Fefant, and chased them to S. aforefaid, and from thence to F. in the fame County, *ad imparcand. quæ sunt ead. captio & efugatio unde, &c. absque hoc quod cepit averia prædicta apud S. prout, &c. Per Cur.* the Plea is ill *causa qua supra;* and as this Cafe is there needs not any traverse at all; for here the Cause of Juftification is transitory, and it fufficeth here, tho' he juftify in another Place, to fay *quæ est ead. captio, &c. Cro. Eliz. p. 667. Sir Walter Sands verfus Lane.*

In Trespafs at D. in Com. *Kanc.* The Defendant juftifies in defence of his Free-hold in Canterbury, *quæ est ead. Transgressio, absque hoc* that the Defendant is Guilty at D. *vel alibi.* The Plaintiff demurred, becaufe the *quæ est ead.* is fufficient without a Traverse. 1 *Rolls* 327. *Courter's Cafe.* 1 *Rolls* 221. *Bateman's Cafe.* 1 *Rolls* 19. Pl. 20. *Austen's Cafe.* *Sed non allocatur;* for the Traverse implies the *quæ est ead.* 3 *Keb.* 799. *Moreon and Charton.*

If the Defendant juftify at another Place, where his Juftification was not local, it's ill. 1 *Sanders* 85.

Quod Def. est seifitus de terra in L. in qua invenit averia dam. facien. & travers quod est culp. in S. exitus quod est culp. in S. Ra. Entr. 630, 665.

Justificatio captionis honorum empt. in London. & traverse quod est culp. in Com. E. Ra. Entr. 676.

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Non culp. al novel Assignment in terris vocat. H. & ad terras vocat. W. quod jacent in alia villa. Ash. 438.

Quod Def. ut serviens L. P. qui fuit seifitus de Manerio de N. in Com. L. piscatus fuit in Rivulo de A. in eod. Com. absque hoc quod est culpab. de captione, frve asportatione aliquorum Piscium apud W. in Com. N. 2 Browne 177.

Traverse of the Time.

A Man brings Action of Trespafs for breaking his Close one Day; he maintains this Action by any one of an Hundred Trespafes before his Action brought; which is the Reason that tho' the Defendant justify for all that Day; yet he ought to traverse all Trespafes before and after this Day until the time of the Action brought. *Hob. p. 104. in Digby's Case.* The Day in Trespafs is not material; therefore Trespafs is laid to be done the first of *May*; the Defendant pleads a Release made to him the first of *June*, *absque hoc* that he was guilty at any time after the first Day of *June*. *Per Cok.* he must traverse that he was guilty before or after the first day of *June*. *3 Bulst. 209. Amson and Walcott.*

In Trespafs 10 November. The Defendant justifieth at another Day, and doth not traverse; as in *Digby's Case*, but saith only *que est ead. transgressio*. *Per Cur.* this is Substance on general Demurrer. *2 Keb. 878. Smith and Butterfield.*

Trespafs of Battery and Imprisonment, 1 *May* 9 *Fac.* The Defendant justifies by Warrant to arrest 4 *May*, 10 *Fac.* *absque hoc* that he is guilty before. He ought to have traversed that he was guilty before or after the Return of the Writ. *1 Rolls Rep. p. 406. Amson and Walcott.*

Trespafs

Trespas for cutting six Posts, &c. 1 May, 28 Eliz. The Defendant pleads, That on 1 May, 27 Eliz. it was the Free-hold of A. M. and he by his Command entred, and cut the said Posts, *que est ead. Transgr. absque hoc*, that he was guilty of any Trespas before the said 27 May, but doth not traverse the time after, therefore it's ill. Cro. Eliz. p. 87. *Higham and Reynolds*.

But observe in some cases the Day may be material, as where the Party claims by special Conveyance, as 18 H. 6. 14. Action against F. S. for taking his Servant, and counts that he by Deed retained his Servant in such a Week. The Defendant may well plead the Servant was retained with him the Friday after; *absque hoc*, that the Plaintiff retained him on Munday. But this is not a Rule always, *vide Yelv. 122, 123*.

If the Defendant justify the Trespas at another time, and not at the precise time laid in the Declaration; yet if he aver that it is the same Trespas whereof the Plaintiff complains, the Plea is good in Substance. 2 Sanders 5. It is but Form, and aided upon a general Demurrer.

The Defendant traverseth the Day where it was not material, for he might have justified the same Day that the Plaintiff hath declared, without any Traverse; yet the Plea was allowed in 1 Sanders 13. *Haw and Planner*. But it was in the case of a great Misdemeanour.

In Trespas for the taking of Goods, the Defendant pleads a Recovery in the Court of *Dorchester* in Debt against the Plaintiff, and Execution upon it by *Fi. fac.* and justifies the taking, appraisment and sale of the Goods by the Consent of the Plaintiff in part of Satisfaction of a Judgment; *quæ est ead. captio, &c.* The Plaintiff demurs upon the Plea, because the Defendant varying in the Time of the taking from the Time alledged in

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the Declaration, he ought to traverse any other taking, for the same Goods may be taken at several times, and the *quæ est ead. captio* is not sufficient. But *per Cur.* the Averment is sufficient. Sir *T. Jones* 146. *Allen* and *Chaming*.

In some Cases where the thing is local, the Defendant need not traverse before and after generally.

In Trespafs and Faux Imprisonment laid 1 *Apr.* The Defendant justifies at another Day at *Warwick* as Sheriff, *absque hoc* that he was guilty on 1 *Apr.* or at any time before or after while he was Sheriff, or at any other Place. *Per Cur.* this Traverse is sufficient, and the Plaintiff must reply and shew if there were any other Assault or Imprisonment; also the traversing the time both before and after, doth not lock up the Plaintiff from assigning another Day and Place, especially the thing being local. 2 *Keb.* 237. *Law* against *King*.

In Trespafs 1 *May.* The Defendant justifies at another Day, *quæ est ead. Transgressio* (of cutting Trees.) *Per Cur.* it is ill, unless it were transitory only: but there should be a Traverse *absque hoc* that he is guilty at the Day in the Declaration; and in the Case of *Law* and *King* there was a Traverse *absque hoc*, that he was guilty while Sheriff. 2 *Keb.* 860. *Marshall's Case*.

Trespafs for breaking into his Chamber, and taking Goods 9 *Oct.* The Defendant justifies by Lease of an House by *N.* for a Year to *B.* which was assigned to the Defendant, who lett one Room to the Plaintiff for a Quarter, and that after the end thereof the Goods being there, they were taken Damage-Fesant, *absque hoc* that the Goods were taken the Day alledged within the Quarter, or at any Day during that Lease. The Plaintiff replies, *de injuria sua propria*. The Defendant demurs on *Crogat's Case*, *de son tort* is no Plea where

Property is in question. *Per Cur.* the Traverse is too short, being tied up to the Quarter of a Year, to which the Plaintiff makes no Title, and leaves not the Plaintiff, as he ought, to traverse the Time or the Point of Justification; for before the Quarter of a Year Trespafs lieth. So the Traverse is short, for the Plaintiff may prove any Day before the Trespafs brought. 2 *Keb.* p. 712, 735. *White and Stubs.* The Reporter seems confus'd in this Case; *capiat qui capere p. test.*

If to a Trespafs *clauso fracto* 11 March, the Defendant pleads a Licence 5 Maij, there he may and must traverse *absque hoc quod sit culpab. ante Licentiam sibi concessam*; and the Plaintiff may take Issue upon the Licence, or upon the Traverse. *Kel.* 340. *Hob.* 104.

The Plaintiff supposed the Trespafs and Faux Imprisonment to be the tenth of December 29 Eliz. The Defendant pleads, That he by Virtue of a Warrant of the Sheriff, &c. did arrest and imprison him the second and third Days of December before; *absq; hoc* that he was guilty before or after the third Day of December, *prout in narratione sua specificatur*, (but saith not before the Action brought) and on this Issue is joined, and ruled to be well enough. *Cro. Eliz.* 95. *Richardson and Pricket.*

Transf. de clauso fract. 9 Maij. *Bar quod clausum fuit liberum tenementum* 10 Maij, & traverse *quod est culp. antea.* 34 H. 6. 13.

Justificatio per Warrant sur Repl. & traverse quod est culp. ante diem. *Repl. quod est culp. antea.* *Ra. Entr.* 669. *Vet. Entr.* 158, 163.

Bar per arbitrament, & traverse quod est culp. postea. *Repl. quod est culp. postea.* *Ra. Entr.* 607.

Justificatio per Def. pro amerciament. & traverse quod est culp. ante diem. *Ra. Entr.* 606.

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Præscriptio pro communia pastura in seperalibus terris ad seperalia tempora pro seperalibus averijs; & traverse quod est culp. cum equis, &c. ac a festo ad festum. Repl. quod est culp. cum equis, &c. ac post festum, & non respond. ad Præscriptionem. Ra. Entr. 579.

Præscriptio pro communia pasturæ per 14 dies ante & post festum, & traverse quod est culp. ante vel post. Exitus super præscriptione, & quod est culp. ante & post. Ra. Entr. 618.

Vide Ra. Entr. p. 623. *Præscriptio per certain Times and Years, & traverse quod est culp. aliquo alio tempore ante vel post diem in narratione præterquam temporibus per Def. allegat. & alius similibus sequen. & præceden.*

Trespafs 20 die Maij. The Defendant pleads a special Justification de Trespafs le 11 die Maij, & traverse que est culpab. devant un apres. Co. Entr. 651. 1 Browne 379.

Traverse of Discent.

In Trespafs, the Defendant conveyed to the Donee by five or six Discent's, by dying seized of the Estate Tail in every of them; the Plaintiff confessed the Intail, and conveyed to him by Feoffment made by the Heirs of the Donee, which was a Discontinuance, and took traverse to the dying seized of the same Feoffee. It was ruled to be ill; for he ought to traverse the most ancient Discent. *Dier 107. cited in Winch. p. 13. Sir G. Savill's Case.*

Where the Discent is not traversable but the dying seized. *Cro. Eliz. 277.*

Traverse

Traverse of Seisin, or Conveyance, and of dying seized, and the Disseisin, and of the Free-hold.

When the Plaintiff and Defendant claim from under one Person, the Conveyance may be traversed; but not if they claim under several Persons. As,

Trespals *quare vi & armis clausum fregit*. The Defendant pleads in bar, That *J. S.* was seized in Fee, and made a Feoffment to *J. D.* to the Use of *D.* in Tail, and claims under the Tail. The Plaintiff replies, That *J. D. de temps dont*, &c. is seized in Fee, and made a Feoffment to him, and he continued seized until the Defendant did the Trespals; *absque hoc* that *J. S.* had enfeoffed *J. D.* in Fee: and adjudged ill; for he ought not to traverse the Conveyance when they claim under several Persons; for there the last Feoffment, or last dying seized is traversable only. 2 *Rolls Rep.* 362. *Barker and Blackmore*. But this Case is more fully reported by *Cro. Jac.* 681.

In a *Clausum fregit*. The Defendant pleads, long time before, &c. one *J. S.* was seized in Fee, and 12 *Eliz.* enfeoffed *T. N.* to the Use of *J. B.* and *M.* his Wife, and the Heirs of their Bodies; and that they had Issue *H. B.* and died seized, which descended unto him, and from him to his three Daughters, and justifies by their Lease and gives Colour. The Plaintiff replies, That long time before the Trespals, that Sir *T. T.* was seized in Fee, and gave it to *E. B.* and *J.* his Wife, and the Heirs Males of their Bodies, and that they had Issue the said *J. B.* and the Plaintiff, and that *J.* had Issue *H.* and died, and *H.* died without Issue Male, wherefore he as Heir Male entred, &c. and traverseth the Seisin in Fee alledged in *J. S.* *Per Cur.* it is in his Election to traverse the Seisin in Fee

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Fee alledged in the Bar, or the Gift in Tail. *Cro. Jac.* 681. *Vide* 6 *Rep.* 25.

Trespass de Clauso facto. The Defendant pleads before the time of *Trespass* one *Francis Taylor* was seized in Fee of the Tenements whereof, &c. and died, and it descended to *Francis* his Son and Heir, who demised to the Defendant for two Years, by virtue whereof he entred, and gives Colour to the Plaintiff by a Grant made to him by *Francis* the Father; and so justifies. The Plaintiff replies, long before *Francis* the Son had any thing, one *F. Taylor* the Grandfather seized in Fee before the time of the *Trespass*, in consideration of Marriage between *Francis* the Son and the Plaintiff *Rachael*, settles the Land to the Use of *Francis* and *Rachael* in special Tail, Remainder to the Heirs of *Francis* in Fee, *absque hoc* that the aforesaid *Francis* the Father of *Francis* the Son, died seized in Fee *modo & forma prout*, &c. Demurrer. *Per Cur.* it's a good Traverse; because that no dying seized is pleaded so that it might be traversed, but with a *sic seisitus obijt*, and the matter only traversable here is the Seisin in Fee *modo & forma*; for by the Replication Seisin jointly with the Plaintiff and to the Heirs of the Body, &c. with a Fee Simple in him is confessed, and that is good with the Traverse. *Hutton* 123. *Edwards* and *Lawrence*.

In *Trespass*, the Defendant pleads his Free-hold. The Plaintiff pleads the dying seized of his Father, and that he is Heir and entred, and that the Defendant disseized him. The Defendant traversed the Disseisin, and not the dying seized of his Father, and good. *Bro. Tra.* 30 *H.* 6. 7.

If in Assize I plead my Father died seized in Fee, and that I entred as Son and Heir to him, and was seized until by *R.* disseized, who enfeoffed the Plaintiff, upon whom I entred, here the dissei-

fin

fin is not traversable, but the dying seized. 30 H. 6. 7. and if the Defendant plead his Father was seized and died seized, and gives Colour to the Plaintiff, the Plaintiff ought to traverse the dying seized, and not the Possession of the Father, which is the Cause of the dying seized. 3 H. 6. 59.

The Defendant justifies in Trespas, That his Father was seized in Fee and died seized, and the *locus in quo* descended to him as Son and Heir. The Plaintiff replies, That the Father infeofft him. Adjudged a good Confession and Avoidance, without traversing the dying seized of the Father. *Dier p. 266.*

Where the Defendant doth alledge Seisin in one from whom he claims, the Plaintiff cannot alledge Seisin in another from whom he claims before the Seisin of, &c. without traversing, confessing or avoiding the Seisin alledged by the Defendant. *Cro. Eliz. p. 30.*

In Trespas the Defendant alledged Seisin by Lessee for three Lives, and that they as Servants enter'd. The Plaintiff replies, That before Seisin of the Lessee for three Lives there was a Lease made for 99 Years, for the Life of one *W.* under whom he claimed. The Defendant Demurs, because the later Seisin alledged in the Lessee for three Lives is not traversed or confest. *Per Cur.* it's confest by saying, that before the Seisin of the Lessee for three Lives, the Plaintiff had a Lease for Years, and Judgment *pro Quer.* 3 *Keb.* 467. *Parsons and Parish.*

The Defendant justifies by Licence made the Day before the Trespas by the Earl of *S.* who was seized. The Plaintiff demurred, because he saith not the Earl was seized at the time of the Trespas, and so the Plaintiff can take no Traverse. *Per Cur.* The Plaintiff may traverse the Licence, which will bring the Free-hold and Seisin of the Earl

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Earl in question, or he may take the Licence by Protestation, and traverse the Seisin of the Earl, because his Seisin shall be intended to continue; though the Pleading had been more formal to say *tempore quo*, &c. and long time before the Earl was seized. But this is not a Matter of Substance. 2 *Keb.* 266. *Thacker and Comberludge.*

A Traverse must be strict to the Point. As, The Defendant pleads in Bar, That such an one was seized of Land in the Right of his Wife, and that his Wife died seized, and that he was Heir to her, and entred, and gave Colour to the Plaintiff. The Plaintiff replies, That the Husband and Wife were jointly seized, and that the Wife died, after whose Death the Husband was seized by Survivorship, *absque hoc* that the Wife Died seized. The Traverse is not good, that the Wife did not die seized; but it ought to be, that she did not die sole seized. *Winch. Rep.* p. 7.

In Trespafs, if the Defendant pleads *J. S.* was seized in Fee and enfeoffed him. The Plaintiff replies, That he was seized in Fee, and leased to *J. S.* for Life, *absque hoc* that *J. S.* was seized in Fee. It is good. 1 *Keb.* 374. *Holden and Swindale.*

The Defendants justifies in Trespafs *Quare clausum, &c.* that the *Locus in quo* was *solum & liberum Tenementum* of *J.* Marquiss of *W.* and justifies by his command. The Plaintiff Replies, That this Land is parcel of the Manor of *A.* and that *W.* Marquiss of *W.* was seized in Fee of the said Manor, and levied a Fine thereof to the use of himself, and *L.* his Wife for their Lives, the Remainder to the Lord *Edward P.* for 100 years if he lived so long. *Willam* the Marquiss dies and *Lucy* also, and that *Edward* entred, and Lett it to him for 21 years, who entred and put in his Cattle, and avers the life of *Edward*. To this Replication it was demurred, because this
Replication

Replication doth not answer nor confefs and avoid the Freehold of the faid J. the Marquis alledged in in the Bar. But *per Cur.* The Bar being a Bar at large, the Title in the Replication being at large, his claiming but a Lease for years, is a fufficient and good Replication, without answering to the Freehold, *Cro. Car.* 384. *King and Coke.*

In *Transgressionem de clauso fracto* Def. dicit *quod locus in quo est* 10 Acres of Land, &c. and Pleads it the *liberum Tenementum* of a Stranger and the Defendant as Servant, &c. The Plaintiff Replies, That a Stranger before the Trespafs was seized, &c. in Fee and Infeoff the Plaintiff, by which Feoffment he was seized until he was disseized by the faid Stranger, in whose right the Defendant justifies & *quod postea & ante transgressionem* he made a regrefs and was seized in Fee *quousque* the Defendant *tali die & anno* did the Trespafs, the Defendant maintains the Bar and traverseth the Disseizin. *Per Cur.* The Replication is naught, because he doth neither deny nor traverse the Freehold, *tempore Transgressionis*, but he ought to have alledged the Mesne Trespafs between the Disseizin and the Regrefs, &c. *Dyer* 134. 179. *Book of Entries* 582.

Traversing a Licence.

Def. justifies by Licence from the Plaintiff's Son. The Plaintiff Replies, *quod non intravit per Licentiam suam*, its a negative pregnant; for he ought to Traverse the Licence by it self, or the Entry by it self, *Cro.* 2. 87. *Vide supra* 2 *Keb.* 266. *Thacker's Case*, *pag. precedenti.*

Where

Where the Command is Traversable.

The Defendant Pleads, That the place where is the Freehold of J. S. and that he entred by his Command. The Plaintiff Replies, That as to one Acre it is the Freehold of J. S. which he let to him at Will, *absque hoc*, that he entred by the command of J. S. and as to the residue, &c. By this special Pleading the Command is Traversable, *Cro. Pas.* 38. *Eliz. Butler and Wallis.*

Commandment is not Traversable but in special Cases, 2 *Leon.* p. 215.

Traverse Custom.

Where the Plaintiff confesseth a particular Custom in his Replication, he ought to Traverse the general Custom alledged by the Defendant, *Litt. Rep.* 274.

Of Traverse and Title.

Where one must make Title on his Traverse, and where it is not necessary.

Note, This difference, for clear understanding of which, I shall largely Cite out of Justice *Fenner's Case*, in *Popham Rept.* p. 1, 2. A Case acutely argued I say.

Note, A diversity where in Pleading in Trespas the first Possession is acknowledged in the Plaintiff by the Bar, and where it appears by the Pleading to be in the Defendant, and where, and by what matter the first Possession acknowledged in the Plaintiff by the Bar, is avoided by the same Bar; for in Trespas in some Cases the Plaintiff may Traverse the Bar, or part of it, without making

making any other Title, than that which is acknowledged to the Plaintiff by the Bar ; but this always ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another means destroyed by the said Bar ; for there it sufficeth the Plaintiff to Traverse that part of the Bar which goeth in Destruction of the Title of the Plaintiff comprised in the Bar, without making any other Title ; but if he will Traverse any other part of the Bar, he cannot do it without making an especial Title to himself in his Replication, where by the Bar the first Possession appeareth to be in the Defendant, because that although the Traverse there be found for the Plaintiff; yet notwithstanding by the Record in such a Case, the first Possession will yet appear to be in the Defendant, which sufficeth to make his regrefs upon the Plaintiff ; and therefore the Court hath no Matter before them in such Case to adjudge for the Plaintiff, unless in Cases where the Plaintiff shews a special Title under the Possession of the Defendant. As in Trespas for breaking his Close, the Defendant pleaded that J. G. was seized in Fee and enfeofed, J. K. by vertue of which he was seized accordingly, and being so seized infeoffed the Defendant of it, by which he was seized until the Plaintiff claiming by colour of a Deed of Feoffment made by the said J. G. long before that he enfeofed, J. K. (where nothing passed by the said Feoffment) entred, upon which the Defendant did Re-enter ; here the Plaintiff may well Traverse the Feoffment supposed to be made by the said J. G. to J. K. without making Title, because that this Feoffment only destroys the Estate at Will made by the said J. G. to the Plaintiff which being destroyed, he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Disseisin, and not by the Feoffment

offment of the said *J. K.* for the first Possession of the Defendant is a good Title in Trespas against the Plaintiff, if he cannot maintain or shew a Title Paramount. But the Feoffment of the said *J. G.* being traversed, and found for the Plaintiff, he hath by the acknowledgment of the Defendant himself a good Title against him, by reason of the first Estate at Will, acknowledged by the Defendant to be to the Plaintiff, and now not defeated; but in the same Case he cannot Traverse the Feoffment supposed to be made by the said *J. K.* to the Defendant, without an especial title made to himself; for albeit *J. K.* did not Enfeoff the Defendant, but that the Defendant disseized him, or that he cometh to the Land by another means; yet he hath a good Title against the Plaintiff by his first Possession, not destroyed by any Title Paramount, by any Matter which appeareth by the Record, upon which the Court is Judge.

Where it is necessary to say Que est eadem Transgressio, and where not: And of the Force and Effect of these Words.

If the Defendant in Trespas justifie the same day and place, it is not necessary to say, *que est eadem, &c.* 1 *Bulstr.* 138. *Kelv.* 27. 29. 21 *H.* 7. 39.

Trespas for breaking of his Close, &c. laid to be done the seventh day of *May*. The Defendant justifies the Trespas to be done the twentieth day of *May*; if he concludes (*quæ est eadem Transgressio*) the Justification is good; and so is the difference in 21 *H.* 7. 39. 1 *Bulstr.* p. 138. *Vastenop* against *Taylor*.

In

In Trespas at D. in Com. Ranc. the Defendant justifies in Defence of his Free-hold in *Canterbury*, *quæ est ead. transgressio, absque hoc* that the Defendant is guilty at D. *vel alibi*. The Plaintiff demurs, because the *quæ est ead.* is sufficient without a Traverse, as 1 Roll. 327. *Curri's Case*. 1 Roll. 221. *Bateman's Case*. 1 Roll. 19. Pl. 20. *Austin's Case*. Sed in this Case *non allocatur*; for the Traverse implies the *quæ est ead.* *Quære*. 3 Keb. 799. *Moreon and Charton*.

In Trespas 10. No. The Defendant justifies at another day, and doth not traverse, as in *Digby's Case*, *Hob.* but saith only *quæ est ead. transgressio*. Per Cur. this is Substance on general Demurrer. 2 Keb. 878. *Smith and Butterfield*.

Where the Matter of Justification is local, there he ought to shew the Cause specially; but not where it is transitory; but it sufficeth though he justify in another Place, to say *quæ est ead. captio*. *Cro. Eliz.* 667. *Sir W. Sands versus Lane*.

Where the Justification is local, as maintaining the Possession of his House, the Conclusion *quæ est ead. transgressio* is good enough; for it concludes it is the same Cause of Action, but with a Traverse, as it ought to be of necessity. *Cro. Eliz.* 704. *Peacock's Case*.

Vide 2. *Sanders* 3. *Mellor and Walker*, where the averring *quæ est ead. transgressio* shall help the Plea.

Trespas for breaking his Close was laid to be done the seventh day of May, if it be concluded with *quæ est ead. transgressio*, it's clearly good by three Justices against *Yelverton*, by the Book of 21 H. 7. fo. 39. a. where this difference is agreed.

C A P. XXI.

*Foynder in Trespals.**Foynt-Trespallers.*

Trespals in Law is several, and one may answer without the other. It is Joint or Several at the Will of him to whom the Wrong is done. *Co. Litt. 130. b. f. 232. a.*

Diverse Persons may have an Action of Trespals jointly for Goods taken, &c. not for Battery, unless it be in the Case of a Man and his Wife. *Vide supra.*

By Tenants in Common, *vide supra.*

Trespals of Assault and Battery made on two Persons at one time, they shall not join in one Action. *Keil. M. 20. H. 7. Case 2.*

If two hold Land jointly, and Trespals is done upon this Land, one cannot sue for this without the other; but the Action shall survive.

Joint-Tenants and Tenants in Common must join in all Trespalses but Battery.

Acts of one Party, or to one Party, how it shall avail his Companion or not.

A Release made to one Trespaller is available to his Companion, and he may plead it. *Vide Barper Release, Co. Litt. 232. a.*

C. brought Trespals against D. for breaking his House and beating him, &c. The Defendant pleads, That he together with R. M. in the time of the Trespals supposed, did jointly break the Plaintiff's House and beat him, and that afterwards

wards, &c. the Plaintiff did release unto the said M. by his Writing, which the Defendant shews in Court, all Actions, Real and Personal, &c. and avers that the Trespafs whereof the Plaintiff complains, and which he and M. did jointly *est una & eadem, & non alia, neque diversa*. It's a good Plea; for though a Trespafs be joint and several to this Purpose, that he may sue either one or all, yet when two join in a Trespafs, they so make one Trespasser, as either of them is as well answerable for his Fellow's Fact as for himself; and therefore a Release to one dischargeth the whole Trespafs. *Hob. p. 66. Cock and Jenner.*

Trespafs against two. It's a good Bar, that the Plaintiff had Judgment and Execution against one, as well for the breaking of the Close as the Entry. *1 Leon. 19. Lendall and Pinfold. Cro. Eliz. p. 30. Moreton's Case.*

If a Man bring Action of Trespafs against A. *quod ipse simul cum B. & C.* did the Trespafs, and doth not sue them all, his Writ shall abate; but if he bring his Action against A. and A. pleads the Trespafs done by him and B. and that the Plaintiff released to B. and the Plaintiff traverse the Release; yet this Action shall not abate. *Hob. p. 164, 199.*

C A P. XXII.

Several Pleas, and the Consequence.

Trespas against two for taking of a Gun and Dagger from him. One justifies because the Plaintiff assaulted J. S. with them, and in Preservation of the Peace, and for Safeguard of the Life of J. S. he took them from the Plaintiff, and so justifies. The other pleads not Guilty. The Plaintiff replied against him who justified *de son tort demesne*, and this Issue was found *pro Def.* and the same Jury found the other Guilty, and assessed Damages and Costs. It was moved in arrest of Judgment, That in regard the Action was brought against both the Defendants jointly, and the Justification is found for one, the other cannot be guilty. *Sed non allocatur*: For he is found guilty, and cannot take Advantage of the Justification; for it shall be intended he took it at another time without Cause. But if the one Defendant justifies by the Gift of the Goods, and found for him, although the other Defendant be found guilty, yet no Judgment shall be against him; for the other's Plea destroys the Plaintiff's Title, and shews that he could have no Cause of Action, and so it appears to the Court. *Cro. Jac. p. 134. Marlet against Ayliff and Eylett. Hob. p. 54. Aliter* if the Plaintiff had severed the Actions. *Q.*

If Joint-Trespasgers be sued in one Action, though they may sever in Pleas and Issues, yet one Jury shall assess Damages for all; for against Joint-Trespasgers there can be but one Satisfaction; and if they be sued in several Actions, though the Plaintiff make choice of the best Damage, yet

yet when he hath taken one Satisfaction, he can take no more ; and if he require two, an *Audita Querela* well lies. *Hob. p. 66. Cock and Jenner.*

3 *Leon. 122.*

Where a Man hath a personal Action against two Defendants, if they plead severally and he be non-sued against the one before he hath Judgment against the other, he shall be barred against both. For it works in the Nature of a Release of the whole. But where there is but one Defendant, and he pleads to one Part in Issue, and to the other demurs, the Plaintiff may be non-suit for one Point, and proceed for another. *Hob. p. 180. Slowley and Eveleigh.*

Parker brought Action of Trespass against *L. N.* and *W.* *L.* pleads *Non Culp.* and Issue. *N.* and *W.* justify ; whereto the Plaintiff replied, and thereupon a Demurrer joined ; hanging the Demurrer the Issue was tried against *L.* and Damages given and Judgment against him ; and after Judgment the Plaintiff entred a *Nolle prosequi* against *N.* and *W.* *Per Cur.* if the *Nolle prosequi* had been before Judgment, it had discharged the whole Action ; and so had it if Judgment had been against them all, and then the Plaintiff had entred the *Nolle prosequi* against the two, as before ; for Nonsuit, or Release, or other Discharge of one dischargeth the rest. But because the Action was at an end against *L.* and no Judgment had against the other two, so as they are divided from *L.* and are not subject to the Damage found against him. *Per Cur.* he was not discharged. *Hob. p. 70. Parker versus Sir John Lawrence, Nevill and Wood.*

If in personal Actions, as in Trespass, one of the Defendants pleads a Plea which goes to the whole, as a Release (which extends to both) the other pleads a Plea in Bar, which extends only to himself, as *Non culp.* the Plea which goeth to the

whole shall be first tried. *Co. Litt.* 125. b. Or if one pleads in excuse of himself, and the other a Plea which goes to the whole, that which goeth to the whole shall be first tried; for if that be found it maketh an end of all, and the other Defendant shall take Advantage thereof; because the Discharge of one is the Discharge of both. *Co. Litt.* 125. b.

Bar ad sepeales terras per sepeales titulos. *Co. Entr.* 660. 1 *Co.* 107.

Non Culp. per un, Joynancy per anter. *Ra. Entr.* 615.

Trans. versus A. B. C. & D. qui sepe ratim placitant non culp. ad partem post novam assignationem, & ad alias sepeales partes sepe ratim placitant specialiter. Quer. replicat. sepe ratim ad barras A. B. & C. & facit 2 Replic. ad placitum D. A. rejun git ad Replicat. B. facit 3 Rejunctiones, C. 4 Re junctiones, & D. 4 Rejunctiones ad Replicationes. Quer. surrejungit ad placitum A. & facit 3 Sur rejunctiones ad placitum B. & ad placitum C. &c.
A very pretty Record. *Co. Entr.* 180.

Quoad partem non culp. quoad aliam partem son assault demesne. *Tompl.* 335.

Repl. al part que maintain le narr. & traverse le licence, & quoad al. part de injuria sua propria absque tali casa. *Tompl.* 350.

Narr. de clauso fract. & averijs imparcat, Def. placitat quoad. partem in uno clauso præscrip tion pur un way, & quoad al. part in alio clauso liberum tenementum & distress pur damage fesant.
Tomp. p. 360.

C A P. XXIII.

Of the Replication, de Injuria sua propria, the Nature of it, and where necessary, and where good with a Traverse.

THIS Plea by way of Replication, is to be pleaded where the Defendant's Plea is Matter of Excuse, and not where he claims an Interest; as *son Assault demesne* in Battery, and in Scandal, levying of Hue and Cry. *Cok. 8 Rep. 67. Crogar's Case.*

They are Words of Art used in an Action of Trespafs by way of Replication to the Defendant's Plea. As *A. sues B. for a Trespafs. B. pleads that he did it by Command of his Master. A. replies, he did it de Injuria sua propria, absque tali causa, &c. or (absque hoc that his Master commanded him modo & forma)* and here he traverseth the Cause or Commandment of his Master.

Where a Free hold Estate for Years, or Matter of Record comes in Question, in such case he ought to avoid the Title, Lease for Years and Matter of Record, by Matter of as high a Nature. *Latch. 221, 273.* As a Bailiff justifies Imprisonment, for that a *Capias* was awarded to the Sheriff, who made a Warrant to him: Here *de Injuria sua propria* is no Plea. It's all one Cause, and it referreth to all the Plea in Bar, and so the Issue would be full of Multiplicity, and Matter of Record ought not to be put to the Trial of the *Lay-gents*: but in such Case he may reply *de Injuria sua propria*, and traverse the Warrant. It might have been a good Plea in a Court not of Record. *8 Rep. 67. Crogar's Case.*

In Trespafs, if the Defendant juſtify and draw a Free-hold in queſtion, ſuch Replication is not good.

Absque tali causa was omitted, and the Replication not good. 1 *Rolls Rep. p. 47.*

When the Defendant in his own Right, or as Servant to another, claims any Intereſt in the Land, or to any Common, or to Rent iſſuing out of Land, or to any Way or Paſſage upon the Land, here *de Injuria ſua propria* generally is not any Plea. 2 *Sanders 295.* But where one claims not any Intereſt, but juſtifies by Command or Authority derived from another, *aliter*, with a Traverſe *ut ſupra. 8 Rep. 67. Crogate's Caſe. Cro. Eliz. 359.* In Trover of Trees, the Defendant pleads, Queen *M.* was ſeized in Fee of the Manor of *D.* where thoſe Trees were growing, and granted it to the Defendant in Tail, and that *J. S.* cut the ſaid Trees, and granted them to the Plaintiff who loſt them, and the Defendant found and converted. The Plaintiff replies *de Injuria ſua propria* it's not good. For the Defendant juſtifies by claiming an Intereſt in the Free-hold to himſelf. A Repleader was awarded.

Where by the Plea of the Defendant, any Power or Authority is mediately or immediately derived from the Plaintiff himſelf, or is given by the Law, as to view Waſte, &c. there, although no Intereſt be claimed, the Plaintiff ought to reply to this, and ſhall not reply generally *de Injuria ſua propria. 8 Rep. 67. Crogate's Caſe.*

To Aſſault and Battery the Defendant pleads, That he was poſſeſſed of an Houſe in ſuch a Pariſh for Years, and that the Plaintiff entred his Houſe and would have thruſt him out of Poſſeſſion thereof, whereupon he *molliter manus impoſuit* to put him out, and the harm, if any were done, was in Defence of his own Poſſeſſion. Repl. *de Injuria ſua*

sua propria is good. For the Title or Interest comes not in question. *Cro. Car. Skevill and Avery.*

The Defendant justifies, for that the Plaintiff is his Servant and neglected his Service, and he *moderate castigavit*. The Plaintiff pleads, *quod non moderate castigavit*. It's ill upon Demurrer; but good after a Verdict, by the new Statute. It should have been *de Injuria sua propria*. *Sid. p.447. Aubrey and James.*

In Assault and Battery the Defendant pleads a special Plea and justifies. The Plaintiff replies, *de Injuria sua propria*. Verdict *pro Quer.* The Replication is not good, because it answers not the special Matter pleaded, nor takes any Traverse by an *absque tali causa*, as it ought to do, and so there is no Issue joined, and consequently can be no Judgment. *Stiles Rep. 150. Jennings and Lee.*

Trespas of Assault, Battery and Wounding against *Lee* and his Wife, for Assault and Battery made by the Wife. The Feme pleads a special Justification, that it was in defence of her Husband, and so justified the Assault and Battery, and *non culp.* to the Wounding. The Plaintiff replies, *de Injuria sua propria*. The Jury find entire Damages for all, whereas there is not a perfect Issue joined as to the Assault and Battery for want of a Traverse. The Replication was not good, and so the Verdict not good. It was an immaterial Issue, and a Repleader. *Stiles Rep. 198, 210.*

In Battery, the Defendant justifies by Process to arrest one *W.* and the Plaintiff would have rescued him, whereupon he did *molliter manus imponere*. The Plaintiff replies, *de Injuria sua propria, absque hoc* that the Defendant had *Virtute* of such a Warrant taken as that by which the Defendant justified. *Per Cur.* The Justification is sufficient, and better by the Admittance in the
Replica-

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Replication, than if the Issue had been offered *de Injuria sua propria* generally, without such Traverse. 2 Keb: 293. *Haywood* against *Wood*.

In Assault, &c. the Defendant pleads, what he did was in his own Defence. The Plaintiff replies, on Attachment out of Chancery, and by a special Warrant from the Sheriff, he arrested him, and the Defendant rescued himself, and beat the Plaintiff, *de Injuria sua propria*, & *hoc parat. est verificare*. Per Cur. the Conclusion is ill: he ought to plead & *hoc petit*, &c. Cro. Car. 164. *Duncomb* and *Smith*.

C A P. XXIV.

In what Cases the Defendant in Pleading, and the Plaintiff in his Replication, ought to shew or make his Title incertain, and in what not.

THE Plaintiff need not make any Title in an Action of Trespass, it being a Possessory Action. Trespass *quare Fenum suum cepit*; he need not convey himself a Title to it, as for Tithes, &c. and if he do it's Surplusage. If he do make a Title, and not pursue it, it's not material. 2 Bulstr. 288. *Williamore versus Bamford*. 2 Cro. p. 123. *Dent and Oliver*.

Possession to the Defendant is a sufficient Title to put in his Beasts, be it by Right or Wrong. *Yelv. p. 75*.

The Defendant justifies by Virtue of a Lease and saith generally, That at the time of the Trespass he was possessed of a Close called *W.* for a certain Term of Years *adunc & adhuc ventur.* and shews not of what Lease, nor for what Time. *Per Cur.* he need not, for the Interest of the Close is not in Question, but is meerly collateral to the thing in Question (which was default of Inclosures) and it is but Conveyance to the Matter subsequent; for whether the Defendant be seized by Title or by Tort, the Possession and Occupation of the Land is sufficient to justify the putting in his Beasts into the Close whereof he was possessed, although it were but at Will. *Yelv. p. 75. Faldo and Ridge*.

In Trespass the Defendant pleads default of Inclosures, and that the Plaintiff *debit reparatione*, and doth

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doth not shew by what Title, or in what sort: But the Diversity is, where the Right of Inclosing to charge the Inheritance is in Question, and where the Plea goes only in excuse of a Trespafs; as in *Curia claudenda*, he ought to shew the Title in the *debet & solet*; for this is only in the Right, and shall bind the Inheritance for ever: But in Trespafs it goes only in Excuse. And also the Defendant is a Stranger to the Title of the Plaintiff, and may not by Presumption know by what Title he ought to repair; and (by *Popham*) it is good Policy for the Defendant in this Case to be sparing in setting down the Title of the Plaintiff, lest he mistake it, and so be tricked. *Yelv. p. 75. Faldo and Ridge.*

To the Assault and Battery the Defendant pleads, That he was posselt of such an House in such a Parish for Years, and that the Plaintiff entered his House and would have thrust him out of Possession, whereupon he *molliter manus imposuit*, &c. and good, though he doth not shew who made the Lease, nor when it was made, nor for how many Years: For it is but Inducement and Conveyance to his Justification, and not the Substance thereof, which is, that he offered to thrust him out of Possession; and whatsoever Title he hath it is not material, whether by Virtue of a Lease at will, or any other Title: For the Title or Interest not coming in Question, it need not be so certain as where it is pleaded by way of Title to make a Claim in the Defendant. *Cro. Car. 138. Skevill and Avery.*

In Trespafs, Colour of Possession given by the Defendant to the Plaintiff sufficeth; because the Declaration is general upon a supposal, without any Title set forth in certain; but in Trover and all other Actions where the Plaintiff makes a Title to the thing in demand, there the Defendant ought

ought to make a better Title to himself, and to traverse the Title of the Plaintiff, or to confess and avoid it. *Yelv. p. 174. Priestly versus White.*

If a Servant justify by a Lease, he ought to shew it as well as his Master. As Trespafs for entring into his Close. The Defendant pleads, That R. L. was Parson of K. within which Parish this Close lies, and that he by Writing under his Hand and Seal, dated, &c. Lett the Tithes of the said Close to Sir R. O. for three Years, whereon he as his Servant entred the said Close to see what Tithes were due, &c. Ill Plea, because he justifies by Virtue of a Lease for Years of Tithes, and shews not the Deed of the Lease: and although he justify but as a Servant, yet coming in by Title and in Privy, he ought to shew it as well as his Master; and he cannot plead the Entry into another Man's Soil, without making good Title thereunto, which ought to be by shewing the Lease. *Cro. Jac. 360. Sir H. Rolls versus Boulting.*

Trespafs for breaking his Close, &c. and for Title shews, that this was Copy-hold, Parcel, &c. of which C. was Lord, and the Lord granted this to the Plaintiff and his Heirs. The Defendant pleads that long time before, one Pole and Margaret his Wife were Lord of the Manor in Right of the Wife for Life, remainder to S. in Tail, who made a Lease to the Defendant. It's an ill Bar; for he ought to have shewed how this Estate came to Pole and his Wife, and the Commencement of it. *3. Bulstr. p. 282. Sandford's Case.*

Trespafs against D. for breaking his Close, and taking away two Loads of Timber. The Defendant makes Title to the Close, &c. and that he took the Timber. Demurrer; for he hath made no answer to the two Loads of Timber; for the Declaration saith not the Timber was growing upon the Land, nor had the Defendant justified the

the taking this as Damage-Fasant. *Per Coke*, the making of Title to the Land is fufficient where the Declaration is for Corn or Timber annexed to the Land: But this Plea is no Answer to the Timber, unless it appeared that the Timber was growing upon the Land; and so all is discontinued, as in *Harlakenden's Case*. *Quære* if he ought to have demurred specially for this Cause. 1 *Rolls Rep.* 406. *Dense* and *Dense*.

The Defendant pleads, That one *W.* was seized of the said Messuage wherein the Trespafs was supposed to be done, and being so seized (such a Day and Year) did demise it to the Defendant for two Years from such a Feast then last past, by Virtue of which he entred and was posselt untill the Plaintiff claiming by Colour of a Deed made of the said *W.* where nothing passed by the Deed, upon which the Defendant entred, &c. The Plaintiff replies by Protestation, That the said *W.* was not seized as the Defendant hath alledged, *pro placito*, he saith that the said *W.* did not lett it to the Defendant, as the Defendant hath alledged; upon which Issue it was found for the Plaintiff. It was moved in arrest of Judgment, because the Plaintiff hath not made any Title by his Replication. *Per Cur.* he need not make Title in this Case; but it sufficeth to traverse the Bar without making a Title; for here it is acknowledged by the Defendant, that *W.* did demise it to the Plaintiff, and that this is a Lease at Will, at the least not defeated by his own shewing, but by the Lease made to the Defendant; this being traversed and found against the Defendant, the Plaintiff by the Acknowledgment of the Defendant himself, hath a good Title against him to enter into the Land, and the Defendant by his Re-entry is become a Trespasser to the Plaintiff as in 2 *Ed.* 4. The Defendant in Trespafs pleads, That he lett the Land to the Plaintiff for another Man's

Man's Life, and that *cestuy que vie* was dead, upon which he entred ; and adjudged that it sufficeth for the Plaintiff to maintain that *cestuy que vie* was yet living, without making any other Title. *Pop. Rep. 1. Justice Fenner against Fisher.* The Lease made by *W.* to the Defendant, is the material Point of the Bar, which destroyed the Title Paramount acknowledged to the Plaintiff by the Colour, which is good without another Title made.

In Trespafs in some Cases the Plaintiff may traverse the Bar, or part of it, without making any other Title than that which is acknowledged to the Plaintiff by the Bar ; but this always ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another means destroyed by the said Bar ; for there it sufficeth the Plaintiff to traverse that part of the Bar which goeth to the Destruction of the Title of the Plaintiff comprised in the Bar, without making any other Title ; but if he will traverse any other part of the Bar, he cannot do it without making an especial Title to himself in his Replication, where by the Bar the first Possession appeareth to be in the Defendant, because that although the Traverse there be found for the Plaintiff ; yet notwithstanding by the Record in such a case, the first Possession will yet appear to be in the Defendant, which sufficeth to maintain his Regress upon the Plaintiff ; and therefore the Court hath no Matter before them in such Case to adjudge for the Plaintiff, unless in Cases where the Plaintiff shews a special Title under the Possession of the Defendant. As, In Trespafs for breaking his Close, the Defendant pleads that *J. G.* was seized of it in his Demesne as of Fee, and enfeoffed *J. K.* by Virtue of which he was seized accordingly, and so being seized enfeoffed the Defendant of it, by which he was seized until the Plaintiff claiming by Colour of a Deed of Feoffment

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Feoffment made by the said J. G. long before that he enfeofed J. K. (where nothing passed by the said Feoffment) entred, upon which the Defendant did re-enter. Here the Plaintiff may well traverse the Feoffment supposed to be made by the said J. G. to J. K. without making Title, because that this Feoffment only destroys the Estate at Will made by the said J. G. to the Plaintiff, which being destroyed, he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Disseisin, and not by the Feoffment of the said J. K. for the first Possession of the Defendant is a good Title in Trespafs against the Plaintiff, if he cannot maintain or shew a Title Paramount. But the Feoffment of the said J. G. being traversed and found for the Plaintiff, he hath by the Acknowledgment of the Defendant himself, a good Title against him, by reason of the first Estate at Will acknowledged by the Defendant to be to the Plaintiff, and now not defeated. But in the same Case he cannot traverse the Feoffment supposed to be made by the said J. K. to the Defendant, without an especial Title made to himself; For albeit J. K. did not enfeof the Defendant, but that the Defendant disseised him, or that he cometh to the Land by another means; yet he hath a good Title against the Plaintiff by his first Possession, not destroyed by any Title Paramount, by any matter which appeareth by the Record, upon which the Court is to judge. So note a Diversity where in pleading in Trespafs the first Possession is acknowledged in the Plaintiff by the Bar, and where it appeareth by the Pleading to be in the Defendant, and where and by what Matter the first Possession acknowledged in the Plaintiff by the Bar, is avoided by the same Bar. *Pop. Rep. p. 1, 2. Justice Fenner's Case.*

Trespafs

Trespafs for entring his Close and spoiling his Grafs with Cattle. The Defendant pleads, *quod bene & verum est* that the Free-hold was in Sir J. T. and he is Servant, and by his Commandment entred and put in his Beasts, &c. The Plaintiff replies, *quod bene & verum est* that the Free-hold was in Sir J. T. but saith, That long time before the time in which, &c. Sir J. T. lett the Close to the Plaintiff at Will, by which he entred and was posselt untill the Defendant made the Trespafs; *absque hoc* that the Defendant by the Commandment of Sir J. T. entred, &c. On Demurrer, adjudged *pro Def.* for the Bar is good, and not avoided by the Replication; for in his Replication (being by way of Title) he doth not entitle himself to any good Lease at Will; for he doth not alledge in Fact any Seisin in Sir J. T. or any Possession in him, out of which the Lease at Will may be derived. *Yelv. p. 147. Wubam and Barker.*

Trespafs of Battery such a Day. The Defendant pleads, That he *tempore quo*, &c. was seized of such a Rectory in the Place where the Battery is supposed, in Fee, and that *tempore quo*, there were Corn severed from the nine Parts at the Place aforesaid, and the Defendant came to take the Corn, and the Defendant in Defence of his Goods, &c. stood to defend it, and the ill which the Plaintiff had was *de son tort*, &c. Plaintiff replies, *de Injuria sua propria absque tali causa*. The Defendant demurs, and adjudged *pro Quer.* For such general Replication is good, and the Plaintiff need not to answer the Title of the Defendant; because the Plaintiff by his Action claims nothing in the Soil or Corn, but only Damages for the Battery, which is meerly collateral to the Title. But where the Plaintiff makes Title by his Declaration to a thing, and the Defendant will plead another thing in destruction of this, or of the Cause of the Plaintiff's

The Law of Trespafs.

Action, there he ought to reply fpecially, and fhall not fay *absque tali causa*, as 14 H. 4. 32. Trespafs for taking away his Servant. The Defendant fhews, That the Father of him whom the Plaintiff supposed to be his Servant, held of him in Chivalry and died seized, his Heir (*i. e.* the supposed Servant) being within Age, and he seized him as his Ward, *prout ei bene licuit*. The Plaintiff replies *de injuria sua propria, absque tali causa*. The Replication was held not good without answering to the Seigniory (*viz.*) *de injuria sua propria absque hoc* that the Father of him the supposed Servant, held of him in Chivalry; and the reason was, because the Plaintiff by his Action makes Title to the Servant. 16 Ed. 4. 4. *Relv. p. 157. 8. Taylor and Markham. Cro. Jac. 224. mesme Case.*

The Defendant justifies as Servant to K. Charles the Second, to whom the Lands descended from H. 8. The Plaintiff replies and confesseth them in H. 8. but saith that H. 8. granted to the Plaintiff's Ancestor, but doth not traverse *absque hoc* that K. Charles II. died seized, which, *per Cur.* he ought to do; for he hath not answered the whole Title of the King. The Defendant rejoins, That T. the Ancestor granted to J. S. and so conveys under him to the Defendant. *Per Cur.* This is a clear Departure; yet the Plaintiff could not have Judgment. 1 Keb. 920. *Thacker and Ullock.*

In Trespafs the Defendant justifies by Conveyance under the Trustees of the Plaintiff made to his Father *modo Def.* from whom it descended to him, and doth not say as Son and Heir. *Per Cur.* It's amendable; but generally it's ill without shewing how, and this is Substance and part of the Title, and naught on general Demurrer. 2 Keb. 110. *Duke of Newcastle against Wright.*

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The Defendant pleads Not Guilty to all but throwing down the Fences, and as to those he saith, That he was possessor of certain Corn growing there, not saying by what Title, and being inclosed the Defendant broke down the Fences, and entred to come to it. The Plaintiff demurs specially, because the Corn growing differs not from the Land; for if *A.* sow the Land of *B.* it's the Corn and Close of *A.* till *B.* re-enter. And, *per Cur.* Title must be shewed. 3 *Keb.* 61. *Peale* and *Bridges*: For it might be the Lessee's Corn growing there, or the Party may have the Corn by the Grant of the Executors of a Lessee. *Vide* this Case reported by 2 *Sanders* 401.

In Action for stopping a Way or Water-Course and of Lights, the Plaintiff need not make Title; the Cause hereof being the Damages only, and the Title is collateral. So of Action for Disturbance of Common. 3 *Keb.* 820. *Sanders* and *Williams*. It being against a Tort-Ffeasor no Title is necessary. In Actions for Disturbance of Toll in a Fair there needs no Title by Patent or Prescription against the Tort-Ffeasor, but against the Owner of the Soil a Title must be made. 3 *Keb.* 528. *St. John* and *Mobby*.

C A P. XXV.

Venue, or from what Place the Venire shall arise.

IF a Trespas is alledged in *D.* and *null tiel Vill.* is pleaded, the Jury shall come *de corpore Comitatus*; but if it be alledged in *S. & D.* and *null tiel de Vill. de D.* is pleaded, the Jury shall be *de Vicineto de S.* for that is the more certain. *Co. Litt.* 125. b.

The Plaintiff declares, That he is and hath been for twenty Years past an Inhabitant in *L. in Parochia B.* and the Inhabitants of *L.* prescribe to have a Common Way, &c. to go and ride from *L.* to the Parish-Church of *B. præd.* on Lord's Days and Festivals, &c. and shews the Way through divers Closes in *L.* and *Gomersall*, and shews a Disturbance by the Defendant in making a Ditch in one of the Closes in *Gomersall.* The Defendant pleads *Non culp.* and found *pro Quer.* The *Venire fac.* was quasht *per Cur.* because it was *de Gomersall* only, and a new one awarded *de L. Gomersall & B.* *Hutton Rep.* 27. b. *Reyner* and *Waterhouse.*

The Plaintiff counts, he was seized of an House and twenty Acres in *T.* and that he and all those whole Estate he hath, have had a Common in seven Acres in *T.* and have had a Way leading through the said seven Acres and from thence into one Common Way leading to *B.* and from *B.* to *Br.* and that the Defendant had plowed those seven Acres. On *Non culp.* pleaded, the *Venire* was from *T.* only, and *per Cur.* the Trial is good; for *Non culp.* is properly a Denial of Trespas and Disturbance,

bance, and though he ought to prove Title to the Way, yet it is fufficient if he prove Title to the Way by and through the feven Acres upon Evidence; and it is not neceffary the *Venire* fhould be from all the Towns through which he claims his Way; yet if the Prefcription had been traverfed, then he ought to prove all the Way, and the Tryal fhall be from every Town. *Hutton p. 39. Clarke and Wood. Hob. p. 305. mefme Cafe.* The plowing that part of the way in *T.* is a Trespafs there, though it went no further; fo as the reft of the way is indeed but Inducement to the Action, and the Way might have been only laid to and from the Houfe and that piece of Common, both in *T.* *Vide 2 Rolls Rep. p. 122. Lowe's Cafe.* In Ifsue on Prefcription it need not be from all the Places. *Vide fupra in Chymin.* The Places from which and to which fhall have fufficient Conufance. *Palmer's Rep. 35. More, Sir G. Henage and Curtis.*

The Place of the Trespafs is alledged in the Parifh of *H.* and the *Venue* is *de H.* generally, and good. A Parifh, Village or Town fhall be intended all one. *1 Rolls Rep. 27. Spencer's Cafe.*

If one claim a Common in *Dale* appendant to the Manor of *Sale*, the *Venue* fhall be from both. *2 Rolls Rep. 122.*

If a Battery be laid in *D. in Com. N.* with a *Continuando* in *Midd. Venire* fhall be of both Counties. *More, Michel and Long's Cafe.*

The Plaintiff declares of taking Corn fevered from 9 Parts at *E.* in *Com. W.* As to part, the Defendant pleads *Non culp.* as to the refidue, he pleads a Devife of the Parfonage, &c. from *T. L.* to the Defendant at *W.* in the fame County, and for to enable the Devife of the Tithes in *E.* alledges *E.* to be an Hamlet of *W.* and on *non devifavit*, being in Ifsue the *Venue* was from *W.*

only. *Per Cur.* the *Venue* is misawarded; for when the Plaintiff declares of a Trespafs in *E.* this by general Intendment is presumed to be a Village, from which the Matter in Issue ought to be tryed: and though the Defendant had alledged *E.* to be a Hamlet, yet this was only to enable the Devise, and not to extend to the Issue before, *Non Culp.* as to part; for in this Issue the Parties both agree that *E.* is a Village, and this is a perfect Issue in it self: But if the Defendant had pleaded the Devise to all the Trespafs, there the *Venue* had been good. *Yelv. p. 77. Lapworth and West.*

Trespafs against two Defendants for entring his Close (against *S.* and *D.*) *D.* had Judgment against him on *Nihil dicit.* *S.* pleads *Non Culp.* upon which is awarded a *Ven. Fac.* between all the Parties *tam ad triandum exitum quam ad inquirend. de dampnis*, and so was the *Habeas Corpus* and *Distringas*; but the Plaintiffs (*D.* being dead) takes their Record of *Nisi prius* against *S.* only, and he is found guilty. The *Venire* was vitious; for there was no Issue to be tried between the Plaintiff and *D.* the Writ ought to have mentioned only the Issue between the Plaintiff and *S.* and to have a Writ of Enquiry between the Plaintiff and *D.* according to the award of the Roll, which is the Ground of the *Scire Fac.* *Yelv. p. 109. Lord and Sands* against *Scullard* and *Danby.*

Trespafs for breaking his Close called *G.* in *Woodthorp* in *Com. D.* The Defendant pleads, The Close is known as well by the Name of *D.* as by the Name of *G.* and time out of mind had been Parcel of the Manor of *Wingerworth.* The Plaintiff maintains his Declaration, and traverseth that the Place where, &c. is not Parcel of the Manor, and the *Venire* was awarded out of *Woodthorp* only. It's a Mis-trial; it ought to have been as well from the

the Manor of *Woodthorp*: For though the Parties are agreed, that the Place where, &c. lies in *Woodthorp*, yet this being supposed in Fact to be Parcel of the Manor of *Wingerworth*, the *Visne* of the Manor by Intendment shall have better Conu-
 fance of this than the Village of *Woodthorp* only.
Yelv. p. 182. Kniveton and Royley.

On Rule to change the *Venue* from *L.* to *W.* there ought to be *nisi causa ostensa fuit in contra-
 rium* by such a Day; and none being, the Plain-
 riff may come before Plea entred, and suggest that
 he will give no Evidence, but where the Action
 is laid, and so hinder the changing it. But Ser-
 jeant *D.* praying it after Plea enter'd upon the
 Roll came too late, *per Cur. 1 Keb. 859. Ferrers*
and Jaquet.

Trespas for Faux Imprisonment, supposing the
 Imprisonment *apud W.* The Defendant justifies by
 reason of a Warrant upon a *Capias* directed to the
 Sheriff of *Suff.* made at *Bury*, and upon *son tort*
demesne, a *Venue* was from *W.* only. The Trial
 was ill; it ought to have been from *Bury* and *W.*
 a *Ven. Fac. de novo* was awarded. *Cro. Jac. 95.*
Sturgis Judkin.

Faux Imprisonment in *Suffolk.* The Defendant
 justifies, That a Commission of Rebellion issued
 out of the Chancery in *Middlesex* against the
 Plaintiff, directed to *B.* and the Defendant as his
 Servant and by his Command, arrested the Plaintiff,
 &c. the Issue was joined *de son tort demesne*, and
 it was tried in *Suffolk*; and it's Error, because this
 Issue ought as well to have been tried by a Jury of
Middlesex as of *Suffolk*; for one principal part of
 the Cause (*viz.*) the awarding the Commission is
 here in Issue, for the Root of the Justification
 ariseth from thence, and without that the Com-
 mand is of no value. But the most apt Issue had

been to traverse the Record or the Matter in Fact, and not both together. *Cro. Eliz.* 844. *Downing* and *Bayward*.

Trespals of Battery. One of the Defendants pleads Not guilty, the other justified; the Issue against him was *de son tort demesne*, and though but one *Venire* to try these two Issues, yet it's good enough, and it's usual. *Cro. Eliz.* p. 866. *Comb. versus Carew* and *Day*.

Battery in Somersetshire justified by Process in *Dorsetshire*, and tried in *Somersetshire*. *Quare* if this be within the Words of 16 and 17 *Car.* 2. c. 8. there being three Judgments in the Point. *Croft* and *Winter*, *Croft* and *Bayes*, *Wise* and *Adderly*: But the Court declared they were not satisfied with these Judgments. 3 *Keb.* 612, 552. *Masters* and *Wood*.

In Trespals *quare clausum fregit*, the *Venire Fac.* was awarded *in placito transgressionis super casum*, and the Issue-Roll was *in placito transgressionis tantum*; and it was agreed it should be amended; for the Issue-Roll is the Warrant of the Clerk. *Litt. Rep.* 54.

The Action of **Battery** is brought against two, and one dies before Trial, and it is entred upon the Roll: But the *Venire fac.* is awarded against both, and Verdict found against both, and Damages assessed for them, it may not be amended. For it is not the Act of the Court, but of the Jury; so that no Damages may be severed. *Litt. Rep.* 55.

Trespals for entring into an House and into a Close. Upon *Non culp.* pleaded, the Parties were at Issue on one of them, but not for the other; and Verdict *pro Quer.* Judgment shall be given for that which is found. 2 *Bulstr.* 288. *Watts* and *Kempe*. *Quare, vide infra.*

Action of Trespafs for breaking his Close in two Villages in two Hundreds ; there ought to be Jurors from every Hundred. *Bendl. p. 26.*

These Cases I have cited to shew the Exactness of our Common Law in point of Trials ; but they are most of them now over-ruled by the Statute of 16 and 17 Car. 2. c. 8. which enacts, *That after a Verdict Judgment shall not be stayed nor reversed for that there is no right Venue, if the Cause be tried by a Jury of the County or Place where the Action is laid.*

C A P. XXVI.

Issue, Verdict, Evidence.

THE Defendant justifies, That the Place is held of the Earl of N. as of his Manor of W. by Homage, &c. The Jury found that it was held of the Earl of N. as of his Manor of P. and good. For there is a Diversity between Replevin and Trespafs; in Replevin, because the Plaintiff is to have a Return, it behoves the Avowant to make a good Title *in omnibus*; otherwise in Trespafs, which is only in *curse*. *Yelv. p. 148. Goodman versus Ayling.*

The Plaintiff declares of a Trespafs in an Acre of Land in D. and abutts it *East, West, North and South*. Upon *Non culp.* pleaded, the Jury find the Defendant *Culp. in dimidio acrae infra-script.* *Per Cur.* The Plaintiff shall have Judgment. Had the Jury found the Trespafs in a Foot of this Acre it had been good; and their finding the Trespafs in the Moiety of the Acre bounded, it sufficeth in this Action, where Damages are only recovered. Had it been in Ejectment it had been ill; for it is not certain in what part the Plaintiff shall have his *Hab. Fac. Possession*. *Yelv. p. 114. Winckworth versus Man. Cro. Jac. p. 183. mesne Case.* Though the Trespafs was done in the Moiety, yet it may well be alledged to be done in the whole Acre.

Trespafs for entring into his House and into his Close; and one only was put in Issue, and Verdict for the Plaintiff. The Plaintiff shall have Judgment. *2 Bulstr. 288. Watts's Case.*

Trespafs

Trespas of Assault and Battery 1 *Aug. 13 Car.*
 2. The Defendant justifies *per son Assault demesne*,
 and Issue thereon. The Defendant gives in Evi-
 dence Assault and Battery by the Plaintiff, 2 *July*
13 Car. before, and that it was in his own De-
 fence, and brings divers Witnesses to prove it.
 The Plaintiff shews, That the Battery which he
 intended was 9 *July, 13 Car.* and produced di-
 vers Witnesses to prove that. *Per. Cur.* It's good
 Evidence for the Plaintiff; and the Plaintiff need
 not make a special Replication, and shew that
 special Matter; and if another Day had been
 shewn in the Replication, it should have been a
 Departure. *Cro. Car. 514. Thornton and Lister.*
 It sufficeth to shew in Evidence to be done at ano-
 ther Day, *sans son Assault*, for the Day is not
 material.

What Evidence maintains the Issue.

Trespas for breaking his House in such a Ward
 and Parish in *London*. Upon Not Guilty pleaded,
 the Jury found the Trespas, and that the House
 was in the Parish but not in the Ward, and it was
 held that this Verdict was for the Plaintiff: For
 the finding it was not in the Ward, was superflu-
 ous, it being admitted by the Parties, and the Jury
 had not to meddle with it. *Cro. Eliz. p. 283. Has-
 sal and Fuxon.*

In Trespas of his Close broken, if the Defen-
 dant saith that the Place where the Trespas is sup-
 posed to be made is six Acres of Land in *D.* which
 are his Free-hold, and the Plaintiff saith that it is
 his Free-hold, and not the Free-hold of the Defen-
 dant. If the Defendant had six Acres in *D.* and the
 Plaintiff other six Acres, the Defendant may not
 give in Evidence that he made the Trespas upon
 his own Land. *Dier fo. 23. Pl. 147.*

Trespas

The Law of Trespafs.

Trespafs for entring into his Houfe and Garden: And the Plaintiff gives in Evidence to prove the Disseisin, Descent and Entry, &c. The Defendant shews to prove his Entry congeable, a Recovery against the Plaintiff in a Writ of Intrusion; and it was of an 100 Acres of Land, 20 Acres of Meadow, and saith nothing of the Mesuage or Garden.

The Plaintiff declares of the taking of a parcel containing 18 yards, and other 20 yards, & *duarum aliarum parcellarum*; and the Jury finds as to 5 parcels of Cloth guilty, This Judgment was reverst, for it shall not be intended, that one of the first Peices containing several yards, contained 5 parcels; and the Plaintiff declares of 4 parcels only, 2 *Rolls Rep. p. 415. King and Hoskins.*

The Issue joyned was *de injuria sua propria absque tali causa*, and the Jury found Not Guilty generally: The Verdict found the Issue argumentatively only and not directly; therefore its not good, *Stiles Rep. 167. Hobs and Blanchard.*

Trespafs against Baron and Feme, and delare that they beat a Mare of the Plaintiffs, &c. on Not Guilty. The Jury find, that the Wife beat the Mare, and for the residue they found for the Defendant. *Per Cur. Nil. cap. per billam*, for the Verdict is wholly imperfect; they have found the Wife Guilty of beating the Mare, and have given no Verdict as to this touching the Husband, either by way of acquittal or condemnation. Battery against Baron and Feme, supposing that they both beat the Plaintiff, and on *non Cul.* they find the Wife only Guilty of the Battery; this Verdict is against the Plaintiff, for now it appears that the Action of the Plaintiff is *faux*, and the Baron joyns only for conformity; and its not like

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to a Battery charged on J. D. and J. S. for there one of them may be found Guilty, and the other acquitted as being several Trespassors in Law, *Relv. p. 106. Drury and Dennis.*

Trespass for entring of his House and taking his Goods, The Defendant pleads *quoad* the Goods Not Guilty, *quoad* the Entry, that the Plaintiff's Daughter licensed him, &c. and that the entred by that License. The Plaintiff saith *Non intra-vit per Licentiam suam*; he ought to have traversed the License, and not the Entry by the License, or the License by it self and not both together; its a negative pregnant. Q. if aided by the Statute of *Feofails, Cro. Jac. 87. Myn and Cole.*

Trespass *quare clausum fregit averiis depascendo*, (viz.) *equis bobus vaccis porcis & bidentibus.* The Defendants pleads, *quoad* any Trespass *cum aliquibus averiis præterquam cum duobus spadonibus & tribus vaccis* Not Guilty, and for them he justifies for Common; for the first Issue the Verdict found the Defendant Guilty *cum aliquibus averiis* as the Plaintiff counts; as to the second Issue they found *pro Quer. Per Cur.* The Verdict is well enough, finding that he is Guilty *cum aliquibus averiis præterquam*, and is as general as the Count; and it is not material for what number or kind of Cattle, *Cro. Jac. 662. Elston and Durrant.*

Trespass of Assault, Battery and Wounding. The Defendant *quoad* the Wounding pleads Not Guilty, *quoad residuum* justifies by Warrant to Arrest; the Issue was *de son tort Demesne*, and as to that the Jury found that he Assaulted, Beat and Wounded him *de son tort Demesne*, and finds not any thing upon the Issue Not Guilty by it self; yet adjudged to be good, *Crok. Jac. 854. Barper and Baker.*

The Law of Trespas.

If in Trespas the Defendant justifies by reason of Common in 6 Acres of Land, upon which the Parties are at Issue ; and the Defendant in Evidence shews he hath Common in 40 Acres whereof the said 6 Acres are parcel, the same doth not maintain his Title, but the Issue shall be found against him, 1 *Leon. p. 44. Kimpton and Bellamies Case.*

In Trespas the Plaintiff declared, that the Defendant had distrained his Horse, and travelled riding upon him; and the Jury find the Defendant did distrain the Horse and kill him, the Plaintiff cannot have Judgment. 3 *Leon. p. 91.*

Upon Not Guilty in Trespas. The Question was, If he might give in Evidence, that at the time of the Trespas, the Freehold was to such an one, and he as his Servant, and by his command entred. And by *Coke* it might, and so adjudged in *Trevillian's Case*, for if he by whose commandment he entreth hath right, at the same instant that the Defendant entreth the right is in the other, by reason whereof he is Not Guilty as to the Plaintiff, and Judgment accordingly, 1 *Leon. p. 301. Deersly and Nevill.*

Trespas for entring into his House and Land. The Defendant pleads, it was the Free-hold of *J. B.* and he entred as her Servant, and by her command, and the Issue was, if it were her Free-hold or not : The Jury find it was the Free-hold of the Plaintiff for two parts, and the Free hold of the said *J. B.* for the third part. *Per Cur.* The Plaintiff cannot have Judgment on this Verdict ; for tho' the Issue is found against the Defendant, (*viz.*) that all was not the Free-hold of *J. B.* yet it appearing a Tenancy in Common, so that the Plaintiff cannot maintain this Action ; Judgment shall be given for the Defendant. The Plaintiff could not have Judgment though this Tenancy in Common

mon was not pleaded, 3 Leon. 228. Crok. Eliz. Bennington's Case.

Trespafs for breaking his Clofe, beating his Servant and carrying away his Goods. The Jury find Sir T. B. was seized of the Land where, &c. and leased the same to the Plaintiff and one A. which A. assigned his Moiety to C. by whose commandment the Defendant entred. *Per Cur.* The Tenancy in Common between the Plaintiff, and him in whose Right the Defendant justifieth might be given in Evidence; but the Verdict not extending to all the Points of the Declaration, but only to the breaking of the Clofe without enquiry of the Battery, &c. it was void, and a *Venire de novo* awarded.

In Trespafs for depasturing his Pasture. The Defendant Prescribes, &c. to have Common *pro omnibus ovibus* Levant and Couchant on his Manor of H. &c. the Prescription is *pro ovibus*, and the proof falls out to be, that they have Common for their own proper Sheep only, and for lack of the word (*suis*) it was resolved, that the Evidence does not maintain the Prescription, for by the Prescription Sheep in Agistment, or otherwise Levant and Couchant ought to have Common, which is not warranted by the proof. *Palmer* 362. Earl of Devon against Eyre.

ISSUE.

Where Demurrer is to part, and pleading to Issue for the other part. The Court will try the Demurrer first, and the reason of the Tryal of the Issue last is, because then the Jury shall assess Damages for all. *Palmer* 517. Huntly and Bridges.

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The Law of Trespafs.

In Demurrer, discontinuance of part is a discontinuance of the whole ; *aliter*, when they will plead to Issue in Trespafs. *Pal.* 395.

V E R D I C T.

Trespafs for the taking his Tunick and Manteau, and on Not Guilty special Verdict. The Jury found the Defendant as Constable took the Tunick for a Tax, but found nothing as to the Manteau, and for this the Court held all discontinued, 3 *Levins* 55. *Barrow* and *Hagger's* Case.

C A P.

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C A P. XXVII.

Of Damages.

AS to the Title of Damages in Trespafs (which makes a great Figure in our Books,) I shall reduce all to fome certain Rules and Differences, and cite plain Cafes for the more diftinct understanding thereof, which fhall be pertinent.

Of finding Damages intirely where they fhould be fevered.

1. At the Verdict, if the Counfel for the Plaintiff fee that his Declaration is in fome parts uncertain, or that the Plaintiff had no Cause of Action for the one part, it will be done wifely to caufe the Damages to be fevered, and not to fuffer the Jury to give intire Damages. As Trespafs *Quar. clauf. fregit & pisces fuos cepit*, without fhewing the number (which is uncertain) on Not Guilty pleaded and found *pro Querente*, and entire Damages given its ill; for when the Jury have found the Defendant Guilty generally *de Transgreffione in Narratione*, this extends to both Trespaffes. They ought to have fevered the Damages, (*viz.*) fo much for the Fifhes, and fo much for the Clofe broken, and then the Plaintiff fhould have recovered Damage for the breaking his Clofe with Cofts. 5 Rep. 34, 35. *Playter's Cafe*, 3 Bulstr. 198.

A Cafe at the Affizes before Judge *Berkly* was, Trespafs for the breaking his Clofe and eating his Grafs *cum averiis fuis fcilicet*, Oxen, Sheep, Hogs, *avibus Anglice* Turkeys. He held Turkeys are not comprifed within the general word (*averia*)

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which

The Law of Trespas.

which is an old Law word, and these Fowl came but lately into *England*, and Damages were severer for the reason aforesaid.

So, if the Jury assess entire Damages for two Trespases, and for one no cause of Action is given, the Verdict is not good; as the Plaintiff declares, *quare Def. insultum super eum fecit nec non unam equam pretii 6 l. a persona ipsius (querentis) cepit*, The Declaration is not good as to the Mare, for the Plaintiff doth not suppose any property in the Mare, but he ought to have said *equam suam*, or *equam ipsius querentis*, for as it is laid the Mare may be the Defendants, and then the taking is lawful, and the Jury assessing intire Damages for both Trespases, its naught, *Relv. p. 36. Purcell and Bradly.*

Trespas of breaking his Close and beating his Servant, and doth not say *per quod Servitium amisit*. The Defendant pleads *Non cul.* and the Jurors find him guilty, and assess Damages intirely. *Per Cur. Quer. nil capiat per billam. Vide Cro. Car. 196. Salman against Percivall*, there was no cause of Action for one.

In Battery against Baron and Feme; Baron justifies, for that the Plaintiff assaulted his Wife, in Aid of whom, &c. the Feme by her self pleads *son Assault, &c.* both Issues were found for the Plaintiff, and intire Damages given; and ill, for the Feme by her self cannot plead, and a Repleader was awarded. *Stiles Rep. 345. Jarvis and Lucas.*

Trespas against three. 1. Pleads generally *Non cul.* 2. Pleads as to part *Non cul.* 3. As to another part pleads *Non cul.* The Jury gave intire Damages, it was Erroneous. 1 *Bulstr. p. 50. Mill's Case.*

If

If the Jury give intire Damages, where one part is not put in Issue, its Erroneous. As Trespass of Assault, Battery and Wounding, *Quoad* the force the Defendant pleads *Non cul.* and *quoad* the Assault and Battery a special justification. The Jury found the Defendant guilty *de injuria sua propria*; and gave Damages to 20 s. its Erroneous, the Wounding was not in Issue; the Plaintiff might have Demurred upon the Plea. *Siderfin p. 96. Calvert and Arnold.* In Trespass the Defendant justifies as to one thing, and pleads Not Guilty to another, and they are at Issue, and the Jury enquire of one thing only, and tax the Damages for both intirely, the Verdict is ill. 5 Rep. 108. *Pooly and Osborn.*

Trespass of Assault, Beating and Wounding against four Persons; three of them plead Not Guilty, the fourth pleads Not Guilty to part, and justifies for the rest, (*viz.*) the Wounding, and is found guilty as to the Wounding only. Verdict was found generally for the Plaintiff, and intire Damages assessed; its Error, for as to the fourth Person Damages ought to have been severed in relation only to the Wounding, and not as it is, for so Damages should be given twice for the same thing: First against the three, and then against the fourth only. *Stiles Rep. 5. Whitwell and Short.*

Trespass for breaking his Closes, spoyling his Grass and chasing his Cattle *tunc & ibidem* to a Pound, &c. and by default the Judgment is *de Transf. in Clausis præd.* and nothing of the Driving and Impounding; in the Executory Judgment there is intire Damages given *pro Transf. præd. in clausis præd.* not saying any thing of the chasing and impounding which shall be intended out of the Closes, (*viz.*) in the Vill; its Error incurable. 1 Keb. 552. 564. 653. *Hardy and Taylor.*

The Law of Trespass.

Where a Trespass is repugnant (as 20 H. 6. with a Continuando beyond the Teste of the Writ) and the Jury gives Damages for all, its intended they only give Damages for that which they lawfully may, 1 Keb. 257.

Trespass continued many years, and the Statute of Limitations pleaded, the Jury gave Damages for the last six years, and the Plaintiff had Judgment. 3 Mod. 110 *Aldrige and Duke*.

If the Plaintiff bring Trespass, and lay Damages to an 100 l. and the Jury find 50 l. he shall be amerced for the residue, although that the Tort be entire. *Pal.* 270, 271.

Of severing the Damages, where they should be intire.

In Trespass against divers Defendants; they plead *Non cul.* or several Pleas, and the Jury find for the Plaintiff in all, the Jury may not assess several Damages against the Defendants. Trespass of Battery, two of the Defendants plead *son Assault demesne*, the third Not Guilty, both Issues were found for the Plaintiff, and several Damages found against them who pleaded severally, and it was ruled to be ill; for it is one joynt and entire offence by the Plaintiff's Action. But in Trespass against two, if the Jury find one Guilty at one time, and the other at another, or the one be found guilty in part, the other in all, there several Damages may be taxed. 1 Rep. Sir John Heydon's Case, *Cro. Eliz.* 860. *Austen* against *Willward, & alios*. But in Assault and Battery against two, they plead Not Guilty; the Jury shall sever the Damages, but the Costs shall be intire. 1 *Bulstr.* 157.

So

So in Trespafs of Battery and Wounding against two; the one pleads to all except the Wounding, that it was in his own defence, and to the Wounding Not Guilty; the other justifies all in his own defence; and in Issue upon those Pleas, the Jury found the first guilty of the Wounding, and the other Issue against him also, and assesses Damages 20 l. and found the Issue also against the other Defendant, and Damages 100 l. and gave intire Costs against both. And Judgment accordingly; its Error, for there ought to have been but one Judgment for the Damages, and he ought to have made his Election against whom he would have taken his Judgment; this Action is for one joynt Trespafs, therefore one joynt Damage ought to have been given by the Jury against both; and although the Defendants had severed themselves in Plea, yet when they are both found guilty of one and the same Battery, one Judgment only ought to have been given. *Cro. Jac.* 118. *Crane and Hill against Humerstone.*

In Trespafs against divers which plead several Pleas triable by the same Jury, if the Jury sever the Damages, all is vitious. *Austin's Case* cited, 11 *Rep.* 7. a. in *Sir J. Heydon's Case.*

In Trespafs of Assault and Battery against two, if one plead to the Issue and the other Demurrs, yet the Damages shall be assess'd intirely against both of them. 2 *Sanders* 26. in *Jefferson and Dawson's Case.*

Assault and Battery against two, *ad damnum* of the Plaintiff. The Defendants plead *Non cul.* the Jury found for the Plaintiff against both Defendants, and the Jury assesses several Damages to the Plaintiff, (*viz.*) so much against the one, and so much against the other Defendant severally and intire Costs. *Per Cur.* Its well done, because the

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Battery of the one cannot be the Battery of the other, and the Battery of the one may be greater than the Battery of the other; *aliter* in Trespass for cutting down of Trees. 1 *Bulstr.* p. 157. *Samson* against *Cranfeild* and *Upton*.

Inquests on several Venires, which shall Assess the whole Damages.

In Trespass against two, one appeareth and pleadeth *Non cul.* the first Inquest shall assess Damages for the whole Trespass by both Defendants; and afterwards the other appeareth and pleadeth Not Guilty, and is found Guilty; the finding of Damages by the first Inquest to which he was not party, shall bind him. 10 *Rep.* 119. a. In such Case there are several *Venires* awarded, yet the Inquest which passed first shall assess Damages for the whole; and the Defendant which last pleaded, shall be charged with the Damages taxed by the first Inquest, and shall be contributory. 1 *Leon.* 122. 11 *Rep.* *Heydon's Case*.

Election of Damages.

Assault and Battery against *W.* for Battery by him *Simul cum J.* and Judgment against him, and Damages levied; and after another Action is brought against *J.* and he is found guilty, and good, for the Court shall never intend this to be the same Battery; but if he will take Advantage of the first Recovery, he ought to shew it in pleading. But if there be but one Original against both, and several Declarations, then when he hath recovered and had Damages against one, he may not have more Damages against the other; but if he recover against the other, before he had Execution against the first, there he hath Election *e melioribus damnis.*

damnis. Against joynt Trespasors there can be but one satisfaction, therefore if they be sued in one Action, tho' they may sever in Pleas and Issues; yet one Jury shall assess Damages for all, when he hath taken one satisfaction he shall take no more, and if he require two an *Aud. quer. lies. Lit. Rep. fo. 37. Watson's Case, Hobart 66. Cock and Fenner.*

H. brought *faux* Imprisonment against *Anthony Mildmay* and two others; the two last plead they were Justices of the Peace, &c. The Plaintiff replies *non habetur tale Record.* The Defendant Demurrs, and adjudged against them: Sir *Anthony* pleads another Plea on which they are at Issue, and before this Issue tried 200 *l.* Damages are found against the others by Enquiry. The Plaintiff may relinquish Sir *Anthony*, and have Judgment against the other two. *1 Rolls Rep. 395. Headly against Sir Anthony Mildmay.*

Of the Writ of Enquiry.

In enquiry of Damages on a Confession, or a *non sum informatus*, or *nil dicit*, the Plaintiff need not prove the Goods taken, because the Writ commands only the value to be enquired and no more. And *per Cur.* In such case the Judges, if they will trouble themselves may assess Damages without any Writ; *aliter* where *Non cul.* is pleaded, for there the Trespas is denied, which ought to be tried by the Jury, and there the property and the value ought also to be proved. *Yelv. p. 151. Sir Fr. Goodwin's Case.*

The Court may grant a Writ of Enquiry on a Demurrer adjudged for the Plaintiff in a special Plea to part, and Not Guilty for the residue, before the Not Guilty tried, *1 Leon. 141. Ward and Blunt.*

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In a special Demurrer, and nothing said as to part of the Trespass, if a Writ of Enquiry is for the whole, its Erroneous. As Treaspass for breaking his House, and taking and carrying away his Goods. The Defendant justifies all: The Plaintiff *quoad fract. domus & caption. des biens nec non materia in ea content.* Demurrs. The Defendant joins in *hac forma quia placitum præd. quoad fract domus & caption des biens* is sufficient; and Judgment, and Writ of Enquiry and Damages assent. Judgment was reversed, because in the offer of the Demurrer *ex parte quer.* nothing is said but to the breaking the House and taking the Goods; and although the words Subsequent, *nec non materia in ea content.* goes to all the Matter in the Bar; yet the Defendant joyns in Demurrer specially with the Plaintiff, and saith nothing of the carrying away, and as to that nothing is put to the Judgment of the Court; and the Enquiry being for the whole, its Erroneous. *Relv. p. 5. Johnson and Turner.*

In Trespass the Defendant pleads in Bar. The Plaintiff replies, and Demurrer was upon the Replication, and adjudged for the Defendant. The Plaintiff brought Error and that Judgment was reversed, and adjudged that the Plaintiff *recuperet*, and the Record remanded: The Plaintiff shall have a Writ to Enquire of Damages. *Crok. Jac. p. 206. Faldo and Ridge.*

Trespass against certain Persons who plead Not Guilty, and at the *Nisi prius* the Defendants justify as Overseers of the Poor, &c. and shew the special matter in Evidence *per Stat. 43 Eliz. c. 1.* and afterwards the Jury was Sworn, and the Plaintiff was Non-suited. The Court of King's Bench granted a Writ of Enquiry of Damages for the treble Damages, because the same Jury could not assess the Damages. *1 Rolls Rep. 272.*

Breve

Breve de Enquiry super judicio in Trespas.

Ra. Entr. 630. 2 Br. 61.

Simile post novel Assignment. Br. 126.

Simile recitando judicium per default. post Li.lo.

Ra. Entr. 631.

Simile sur nichil dicit Li.lo. Ra. Entr. 631.

Of Mitigation or increase of Damages.

If a *Mayhem* be not made directly by the Defendant *sed potius* by accident, the Court will not encrease Damages. Trespas *quare insultum fecit & male tractavit* the Wife, & *equam* whereon the Wife Rode *percussit*, so that she was cast to the Ground, and another Horse trode on her, so that she lost the use of three of her Fingers, and 8 *l.* Damage, the Court would not increase them, *Siderf. p. 433. Burford* and his Wife against *Dadwell*.

Affault, &c. against two, one appears and its found against him, and Damages taxed, and upon view of the *Mayhem* encreased to 40 *l.* and the other had a Verdict against him, and Damages taxed, the Council moved to increase Damages against the other Defendant upon an other view. The Court would not, they can have the view but once in this Action; *aliter*, if several Actions had been brought. *Lit. Rep. 51, 52.*

Per Curiam, In the Case of *Angell* and *Shatterton*, *Siderfia* 108. where the Particulars of *Mayhem* are not exprest in the Declaration, the Court may not increase the Damages upon the View, unless the Judge, before whom it was tried, of the same Court certify the Particulars, and affirm these are the *Mayhems* they gave in Evidence. So *Stiles Rep. 345. Jarvis* and *Lucas*. The Wounding must be particularly expressed in the Declaration,

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tion, that the Court may judge of it by the Record, and not upon bare Averment.

In Assault, Battery and Wounding, the Jury on Writ of Enquiry found 200*l.* the Court, upon View of the Serjeants, and Examination of Surgeons and Witnesses, increased the Damages to 400*l.* *Stiles Rep.* 310. *Davis* against the Lord *Follyott*.

Damages were increased by the Court on the loss of a Thumb. 1 *Leon.* 139. *Mallett's Case*.

Judgment on *non sum informatus*, and a Writ of Inquiry in Battery, it was moved to mitigate Damages. *Per Cur.* They will never alter the Damages where the Party had also given Evidence at the Enquiry. *Litt. Rep.* 150. *Stanley's Case*.

Sometimes, at the Prayer of the Defendant, when excessive Damages are found, or any Misdemeanours alledged in the Plaintiff, &c. the Court will relieve the Defendant in granting out a new Writ, but to the Plaintiff never, because the suing out the Writ is his own Act.

Trespas was brought *de Clauso fract.* *Continuando* for six Years, and on *Nil dicit* the Plaintiff had Judgment, and the Jury found but ten Shillings Damage on a Writ of Inquiry. The Plaintiff shewing the Land was worth four Pound *per An.* prayed the Court the said Writ might not be received, and to have another for the *melius* Inquiry of the Damages, but it was denied. 2 *Leon.* p. 214.

It's a good Expression in my Lord *Hobart*, p. 99. *I do not regard what the Wrong-doer gains by his Wrong, but what the Owner loseth by it; when the Law runs to repair the Wrong.*

A Motion was made against a Judge of an Inferior Court of Record, for Increasing upon a View the Damages, and in Action of Trespas and Battery, to so much more than was given by the Jury

Jury. *Per Cur.* The proper way to reform it is by a Writ of Error; for none but the Courts at *Westminster* can increase Damages but on view. *1 Vent.* 353.

Inclusive Damages.

In all cases of Trespafs, the special Matter for which Damages shall be given ought to be pleaded (as in Trespafs for taking away an Horse, &c. no Evidence shall be for other Matter than this which is exprest in the Declaration.) except when the Matter ariseth *ex turpi Causa*, as Trespafs *quare domum fregit, & alia enormia*, &c. and the Jury gave 60 *l.* Damage; and it was moved for a new Trial because of the outrageous Damages. And upon Affidavit that the Jury intended great part of the Damages for the Injury the Defendant did to the Plaintiff's Daughter, under Colour that he would marry her, the Plaintiff had Judgment; for this is *ex turpi Causa*, and this may be given in Evidence on such general Declaration under the Words *alia enormia*; because the Law will not compell the Party to shew this of Record. *Sid. p.* 225. *Sippora* and *Basset*.

Trespafs for taking away an Horse going to Market; the Loss of the Market shall be in Damages besides the Value of the Horse.

In Trespafs for cutting an Hole in the Plaintiff's Wall, and making a Pair of Stairs, *per quod* the Plaintiff broke his Arm; and Damages were recovered for all. *Tremenber's Case.* 3 *Keb.* 91. 92.

The Jury giving more Damage than ought to be.

Trespafs of Assault, Battery and Wounding.
The Defendant, *quoad* the Battery and Wounding
pleads

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pleads *Non culp.* and *quoad* the Assault justifies. The Issue was on *son tort demesne*; the Jury found both against the Defendant, and for Battery and Wounding 6 *d.* Damage, and for the Assault one Penny. This is not good, but was reversed in Error; for the Assault was included in the first Issue. *Cro. Jac. 251. Candish's Case.*

When the Jury find more Damage than the Plaintiff hath declared, or more than the Plaintiff declares, and assesses Damage for, it's Error. *Hob. 187. Co. Entr. 643.* But,

The Plaintiff in his Declaration counts to his Damage of 40 *l.* The Jury find 40 *l.* and Costs 20 *s.* which was increased by the Court to 5 *l.* more. This is not Error. *Cro. Jac. 297. Dawkes and Pitfield. 13 H. 7. 16. denied for Law.*

In Trespafs the Jury gave half a Farthing Damage, and good. *2 Rolls Rep. p. 19. Marsham and Buller.*

In Trespafs the Plaintiff declares to his Damage of 100 *l.* the Jury find 150 *l.* he shall recover but 100 *l.* but if Judgment be entered for him for 150 *l.* it is Error. The Plaintiff shall recover Damages according to his Count. *20 Ed. 6. 7. 42 Ed. 3. 7. 13 H. 7. 16, 14. 1 Bulstr. p. 49. Hoblins and Kimble.*

If the Jury gives Damage for that which is not found by them, all is void. As, Trespafs for Beating, Wounding and Imprisoning. The Defendant pleads, as to the Beating and Wounding, Not Guilty; as to the other he justifies as Constable. The Jury find the Justification good, but nothing as to the other Matter; and yet assess Damages to the Plaintiff for the Wounding, for which they did not find the Defendant guilty. *1 Bulstr. 64. Simson and Clay.*

When the Plaintiff alledgeth two things, and an Action is brought for both of them, and Damages

damages given generally, these shall be said to be given for them both. *Vide* 14 Eliz. Action for beating him and his Servants, omitting these Word (*per quod Servitium suum amisit*) and Judgment and Damages given generally. There it was said it shall be intended these Damages were only given for the Battery. 3 Bulstr. 198. *Morris and Baker.*

In Trespas in *Lancaster* the Plaintiff declares for Assault, Battery and Wounding. The Defendant pleads *quoad* Force, *Non culp.* and *quoad* Assault and Battery, That he was removing a Market-Cross, &c. and the Plaintiff interrupted him, *per quod molliter manus imposuit.* And the Jury found the Plaintiff Guilty *de injuria sua propria*; and so recite the entire Declaration of Assault, Battery and Wounding, where the Wounding was not in Issue; & *assidunt dampna occasione Transgression. præd. ad 201.* Per Cur. It shall be intended they have given Damages for all in the Declaration (*viz.*) the Wounding, which was not in Issue, and so it's Error: and the *Quæ est ead. Transgressio* doth not help this Defect: For the Court seeth it is not the same. *Siderf. p. 96. Calvert and Arnold. 1 Keb. 464. mesme Case. Hob. 187. Freeston's Case. Co. Ent. 643.*

C A P. XXVIII.

C O S T S.

BY Stat. 23 Car. 2. c. 9. it is Enacted, *That in all Actions of Trespafs, Assault and Battery, and other Personal Actions, wherein the Judge shall not certify on the back of the Record, that a Battery was proved, or the Free hold or Title of the Land chiefly came in question, the Plaintiff, if the Jury find the Damages under forty Shillings, shall recover no more Costs than Damages; and if more Costs be awarded the Judgment shall be void, and the Party shall have remedy for such vexatious Suits.*

In Action of Trespafs *quare clausum fregit*, and putting Stakes in the Ground, it was held that this was within the late Statute of no more Costs than Damages; but if any thing had been taken away (of how little value soever) it had not been within the Statute. 2 Ventr. 48.

Trespafs for entring into his Close and defouling his Grass. The Defendant justifies by a Way. The Plaintiff replies *extra viam*; and Issue upon it, and Verdict *pro Quer.* And the Question was, If he shall have full Costs, or no more Costs than Damage; because (as was said) no Title can be in Question upon the Trial; for the Way is admitted, and the Issue is only if he be *Culp. extra viam*. But *per Cur.* the Plaintiff ought to have full Costs. For 1. There was a Title to the Way in Question upon the Record, and so the Case out of the Intent of the Statute. 2. Upon the Issue *extra viam* the Title to the Way is in Question, *scilicet*, of what Extent it is, *viz.* of

ten

ten or twenty Feet in Breadth, &c. all which came in question upon the Trial, and the Plaintiff had full Costs. 2 Levinz. 234. *Affer and Finch.*

In Trespafs for breaking, throwing down and spoiling of seven Stations (*Anglice* Standings) of the Plaintiff in *H. locat. & erect. pro venditione & expositione Bonorum & Merchandizarum diversarum personarum ad mercat. de H. prædict. tempore mercat. ibid. tent. venientium pro rationabili salario per ipsas eid. Quer. proinde solvend. ad dampn. Sur non culp. Verdict pro Quer. Dampna 2 d. Mis. 40s.* The Question was, if the Plaintiff shall have more Costs than Damages upon the new Statute. Resolved, *per Cur.* That the Statute doth not extend to this Case, or other-like Cases of Goods. *Sir Tho. Jones 232. Smith and Betterton. Raymond 487. mesme Case.* For though he recover under 40 s. Damages, yet he shall have full Costs.

In Trespafs for breaking his Net, the Defendant pleads Not Guilty. It was moved for full Costs on 23 *Car. 2. c. 9.* But the Issue being Not Guilty, and there being no Title in the Declaration, nor not being certified by the Judge of Assize that the Title was in Question, the Court refused to give more Costs than Damages. 3 *Keb. p. 121. Earl of Pembroke and Weshall.*

Trespafs (or in special Action on the Case) for Battery of his Servant *per quod Servitium amisit.* Co^t il prayed Costs without the Judges signing the *Postea*, that the Battery was well proved: and *per Cur.* it was granted in *B. R.* on 23 *Car. 2. c. 9.* 3 *Keb. 184. Peake's Case.*

Trespafs of Assault and Battery. Verdict found the Assault, and Not Guilty as to the Battery. And it was only of a Woman's shaking a Sword against the Plaintiff in a Cutler's Shop, being on the other side the Street. *Hales* certified the Assault well proved,

proved, and there was no more Costs than Damage; and *Hales* said, this was not within the Statute, unless the Battery had been found. 3 *Keb.* 283. *Smith* and *Newsham*, p. 292. But p. 303. the Court conceived no more Costs be, *de incremento*, than Damages. And p. 335. the Assault only being certified and proved, and not the Assault and Battery, it's out of the Stat. 21 *Jac.* 6. being that no increase of Costs be. But 23 *Car.* 2. c. 9. makes the Judgment of more Costs void, which includes Costs and Damages that hereby increase not by the Verdict of the Jury; for the Statute never intended that if the Damages found be 30 s. and increase 10 s. that then the Party should have full Costs, as he must if the Statute should extend to the increased Costs. The Action was begun in the *Marshalsea*, and removed in *B. R.* by *Habeas Corpus*, and tried there, and Verdict of the Assault, and not of the Battery; yet ruled no more Costs than Damages. p. 357. *Vide* this Case in 1 *Levinz.* 102.

Full Costs were allowed in Trespafs begun in the Palace-Court, and brought into *B. R.* by *Habeas Corpus*, because the Statute was made for advantage of the Defendants, that they should not be troubled in the Superior Courts. 3 *Keb.* 423. *Gunnel* and *Skudimore*.

In Actions brought against Mayors, Justices of the Peace, Constables, &c. in Trespafs for any thing done by Virtue of their Office, if Verdict shall be for the Defendants, or the Plaintiff therein shall be Non-suit, or suffer any Discontinuance thereof, the Defendant shall have double Costs. *Vaughan* p. 113. *Stiles* Case. *Vide* Stat. 21 *Jac.* c. 12. 7 *Jac.* c. 5.

CAP.

C A P. XXIX.

Judgments in Trespafs, and their Entries.

Trespafs against four. One of the Defendants, being an Infant, appeared by Attorney. It's erroneous, and the Judgment shall be reversed against all. *Allen p. 74. Trin. 24 Car. Oates and Aylett. Stiles Rep. p. 121, 125. Aylett and Oates.*

Judgment in Trespafs against three. One died hanging the Writ, and Judgment against all was entirely reversed. And 5 *Ed. 4. 7. a.* was denied for Law. *Moor and Scrivener's Case* cited in *Oates's Case. Allen's Rep.*

In all Actions *quare vi & armis*, if Judgment be given against the Defendant, there shall be Fine and Imprisonment; and the Judgment is, *quod Def. capiatur, i. e. quod capiatur quousque finem fecerit.* 8 *Rep. 59. Beecher's Case.*

In Trespafs *vi & armis* Judgment is, *quod capiatur*; in Action on the Case, *in misericordia*. But if the Bill in Trespafs be general, it may be used either way. *Hob. p. 180. Stiles 130.*

Where a Judgment is reversed for an Error in Law against some of the Defendants, it is reversed against all of them. But it seems to be otherwise where it is reversed for a Matter in Fact, *per. Rolls. Stiles Rep. 121.*

Judgment on default in Trespafs, &c. ought to be *recuperare debeat*; and because it was *quod recuperet* in Inferior Court, it was reversed for Error. 1 *Keb. 394. Sheffield and Morris.*

The Plaintiff was non-suited in Trespafs after Evidence. The Judgment is, *quod nil cap. per billam.* It's no Error; for of later times all Pre-
Z
sidents

The Law of Trespas.

sidents are in that manner. And further, the Judgment was, *quod querens & Plegij sui sint in misericordia pro falso clamore suo*, whereas it ought to have been, *quia non prosecut. sunt*: for it ought not to be *pro falso clamore*, but after a Verdict or Judgment on Demurrer. *Cro. Jac. 213.*

On *Non sum informatus*, or upon *Nihil dicit*, Judgment for the Plaintiff; and a Writ of Enquiry issued out, and was returned. It was moved that the Writ should not be filed, because the Plaintiff at the time of the Enquiry did not prove that they were his Goods, but proved only the Value of them. But, *per Cur.* the Plaintiff is not bound to prove his Property in either of these Cases, because the Writ commands only the Value to be enquired of. *Aliter* where Not Guilty is pleaded; for then the Trespass is denied, and must be proved and tried by the Jury, and there in that Case both the Value and Property do come in question. *Cro. Jac. 220. Goodwin against Welsh and Over.*

Where there be two Defendants, and the one pleads Not Guilty, and the other pleads another Plea, or justifies, &c. whereupon it is demurred, and Judgment is for the Plaintiff against the Demurrant, and a *Nolle prosequi* for the other. The Judgment as to the *Nolle prosequi* ought to be entered, *quod eat sine die*. But where it is against one, Presidents are both ways. *Cro. Jac. 439. Evelyn and Sloley.*

Trespas against two. They imparle. At the day one appeared not, and thereon *Nihil dicit*. The other pleaded in Bar. The Plaintiff replied, and a Demurrer joined on the Replication, and adjudged *pro Quer.* And in the same Term a *Nolle prosequi* was entered against the first, and a Writ of Enquiry of Damages against the second. *Per Cur.* This *Nolle prosequi*, or *Retraxit* against one, is as strong as a Release to one, which is a Discharge of

of both. *Cro. Eliz.* p. 762. *Green and Charnock. Vide infra.*

Issue and Demurrer in Trespafs. *Ven. Fac* awarded as well to try as to enquire. Judgment on Demurrer for the Plaintiff. *Nolle prosequi* entred *quoad* the Issue; Writ of Enquiry awarded, and Judgment on this. 1 *Sanders* 340, 341. *Mellor and Spateman.*

In an Action where Damages are to be recovered, as in Trespafs, &c. if the Declaration be good in part, and insufficient in part, and the Defendant demurs upon the entire Declaration, the Plaintiff shall have Judgment for that that is well laid, and barred for the residue. 2 *Sanders* 379, 380.

Judgment in *B. R.* that the Plaintiff should recover Damages for part, and the Defendant *capitur*, and that the Plaintiff *fit in misericordia pro residuo transgressionis*. It should have been, *Quer. nil cap. per Billam pro residuo transgressionis*. But it was held good. *Moor. Palmer and Sherwood's Case.*

In Trespafs of Battery against two, they plead severally and found against both: there ought to be but one Judgment. *Vide supra, Cane and Humerston, Tit. Damages.*

In Trespafs against Three, after Judgment it is assigned for Error, That one of the Defendants was an Infant at the time of the Plea pleaded by Attorney. *Per Cur.* It is Error: But being after Verdict, it had not been Error if one of the Plaintiffs, for whom it was, had been an Infant; that being saved *per Stat. 21 Jac.* and Judgment was totally reversed. 1 *Keb.* 940. *Topham, &c. against Godson.*

If the Defendant be found Guilty of the Offence, he is to pay a Fine to the King.

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Note, By the Statute of 16 and 17 Car.2.c.8. it is enacted, That no Judgment after Verdict, Confession by Cognovit Actionem, or by Relicta Verificacione, shall be reversed for want of Misericordia, or Capiatur, or for that one is put for the other.

Trespafs and 300*l.* Damages recovered, and Judgment and Error brought of it in the Exchequer-Chamber, hanging which the Plaintiff brings Action of Debt in the same Court for the 300*l.* *Et per omnes præter Keeling*, it well lies; for the Record it self is still in this Court, and the Writ of Error is a *Supersedeas* of the Execution only. 1 *Levinz.* 153. *Adams versus Tomlins.*

Non informatus, and a Writ of Inquiry of Damages awarded. 1 *Browne* 375.

Non sum informatus al novel Assignment, & *breve d'enquiry awarded.* *Modus Intrandi* 398.

Simile al Replication, and Inquiry awarded *sans assigning locum in quo*, &c. *Modus Intr.* 398.

Simile in Trespafs and Assault. *Mod. Intr.* 399.

Simile in faux Imprisonment, and Inquiry awarded. *Mod. Intr.* 399.

Nil dicit al novel Assignment, *ove* Inquiry awarded. *Mod. Intr.* 399.

Simile al Replication ove Inquiry. *Mod. Intr.* 399.

Simile al Narration. ove Inquiry awarded. *Mod. Intr.* 400.

Simile in Assault and false Imprisonment. *Modas Intr.* 400. *Pl. gen. & sp.* 619.

Judgment per default. 1 *Browne* 375.

2 *Demurrers & 1 Venire Fac. awarded en Assault*, *Judgment pro Def. sans notice del Issue.* 1 *Sanders* 80.

Judgment pro Querente in Transf. cum exit. *striat. ad barram.* *Tomps.* 455.

Judgment

Judgment in Trans. ubi Curia mitigat. dampna per Furat. assess. Tompl. 457.

Judgment pro Quer. puis Verdict. Mod. Intr. 400.

Simile in Trespafs and Assault. Mod. Intr. 401.

Judgment sur Breve d'Inquiry in Trans. Mod. Intr. 401.

Simile in Trespafs, Assault and Imprisonment continued per non mis. Breve. Mod. Intr. 401.

Entre de Nolle prosequi versus le Def. simul cum. Modus Intr. 400.

Process Judicial.

Ca. Sa. in Trespafs and Assault. Mod. Intr. 402.

Ca. Sa. sur Nonsuit. Mod. Intr. 402.

Ca. Sa. for several Damages in Trespafs and Assault. Mod. Intr. 402.

C A P. XXX.

What will be a good Discharge of Trespafs or not.

D E A T H.

IF Trespafs be done to the Goods of the Testator in the Hands of the Executor, if the Executor after dies, his Executor shall not have an Action of Trespafs for this; for *actio moritur cum persona. Vide prius, 18 H. 6. 22. b. contra.*

If one beat my Servant, and afterwards he dies, I shall have Trespafs; *aliter*, if my Wife. *Vide supra Huggin's Case.*

And if one ravish my Wife, and my Wife dies, I may have an Action of Trespafs.

By Act of the Party, as Release or Act in Law.

Release to one Trespaffor dischargeth all. *Vide Tit. Bar by Release, Hobart p. 66.*

After Trespafs done on my Land, if I Alien the Land, I may have Trespafs for the Trespafs made before. *19 H. 6. 28. b.*

If Bailee of Goods bring Trespafs, and the Bailor brings other Trespafs, he which first Recovers shall oust the other of the Action. *Vide Prius.*

Where a Man hath a personal Action against two Defendants, if they plead severally, and he be Non-suit against the one before he hath Judgment against the other, that he shall be barred against both, for it works in the nature of a Release of the whole; but where there is but one Defendant, and he pleads to one part in Issue,
and

and to the other Demurrs, the Plaintiff may be Non-suit for one point, and proceed for another. *Hob. p. 180. Slowley and Evelyn.*

Trespafs of Assault and Battery the last day of Oct. 10 Jac. The Defendants pleads, That he and one other in the said last day of Oct. did joyntly enter into the Plaintiff's House at S. and did then and there Assault the Plaintiff, and that afterwards, (*viz.*) such a Day and Year the said Plaintiff did by his writing Release the said R. of all Actions, &c. and avers it to be the same Trespafs, &c. and the Plaintiff traverseth, without this that the Trespafs was joyntly done; and Demurrs on the Plea. A good Plea: Satisfaction by one is satisfaction for all, and the Plaintiff cannot have several Damages, but one Damage against them all. *1 Brownl. Rep. 196. Cock and Fennor. Vide Mesme Case per nosme de Cock and Fennor.*

J. S. was seized in C. B. for a Battery supposed to be done in London; and the Plaintiff had Judgment and 30 l. Damages, and J. S. was taken in Execution for the same; and afterwards he and two others were sued in B. R. for this Battery supposed to be done in C. H. And Judgment was against them, and it appeared that this Action and the Action in C. B. were for one and the same Battery; and that the Plaintiff had acknowledged satisfaction of the said Judgment to J. S. in C. B. and yet against Law he had sued to have Execution of the said Judgment, &c. this was surmised in *Aud. qu.* by all the three. It was moved (on Demurrer) for the Defendant in the *Aud. quer.* That this cannot be surmised, because the one Recovery being in London, and the other in C. H. it cannot be intended to be one and the same Battery. *Per Cur.* The Action being Transitory, it may be laid in what County

the Plaintiff will ; and it being averred by the Record to be one and the same, and this being confessed by the Demurrer, the Plaintiffs are not such Strangers to the Record, but they may have a benefit of the Satisfaction by the said Record, and because they are all parties to the Act, the Law gives them Liberty to take Advantage of any one of their Acts for the others Discharge, as in Case of a Release. *Cro. Car. 443. Corbet and Barns.*

Trespafs brought against three, one Pleads *Non culp.* and upon the Issue and Verdict for the Defendant. And Judgment by default and Writ of Enquiry of Damages against the other two ; and upon Judgment for the first Defendant, and Judgment for the Plaintiff against the other two, they only brought the Writ of Error, and Assign the want of an Original. And though there be a Verdict in the Case, it is not cured by the Stat. the Verdict being for the Defendant and so out of the Case. And so it is, as if the Action had been brought only against the ; but if the Verdict had been for the Plaintiff against the first Defendant, this had been aided by the Statute ; for the want of an Original *quoad* all is cured where any Verdict is for the Plaintiff. And tho' the Writ of Error be brought by two without the third, yet its good, for he may not be joyned, for he being acquitted, and Judgment for him, he cannot say the Judgment is to his Damage. *1 Levin. 210. Cannon and Abbot.*

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